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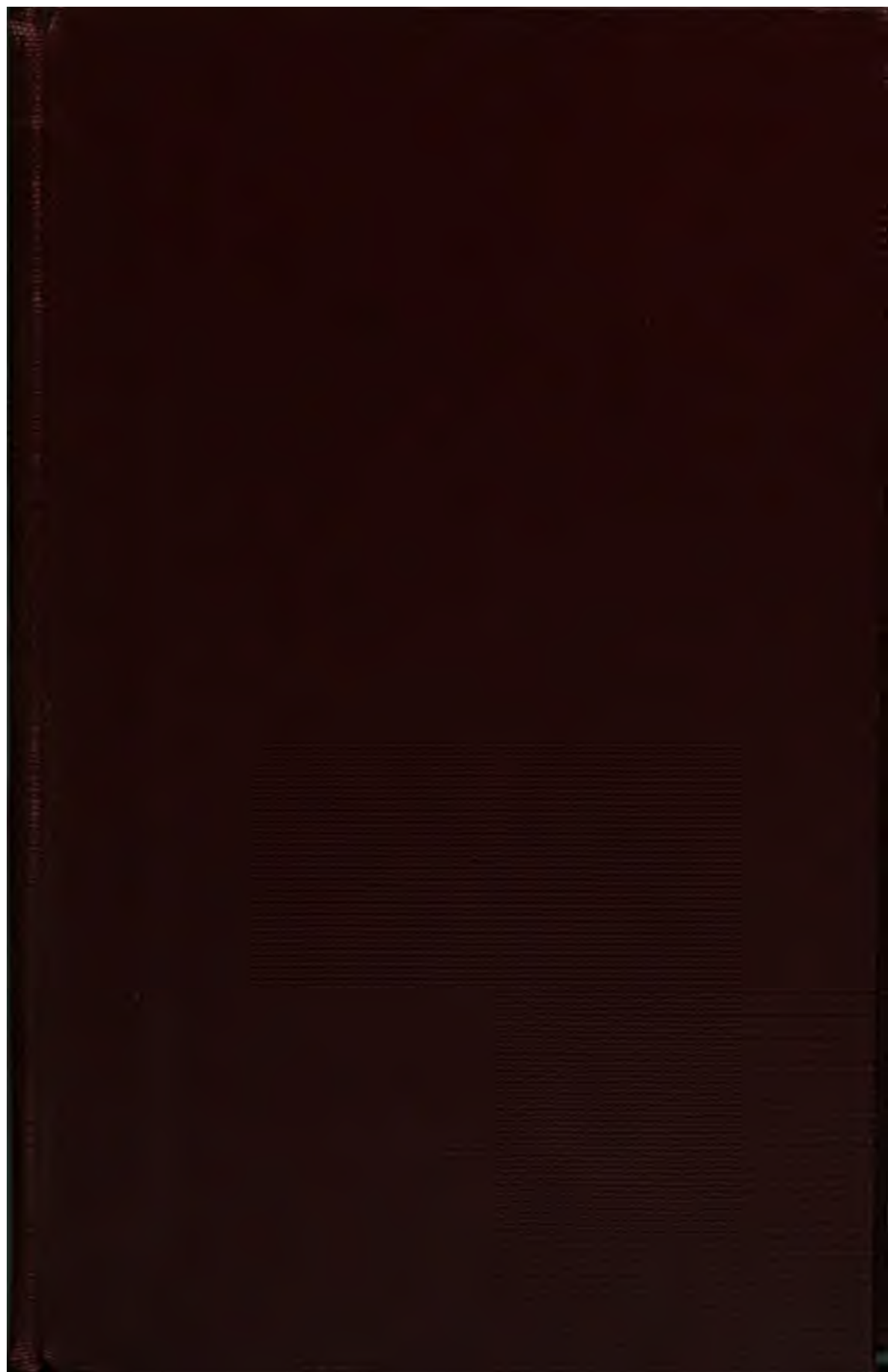
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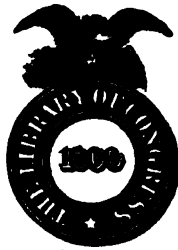
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**AN ACT TO REGULATE  
COMMERCE, ETC.**

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**HEARINGS ON HOUSE BILL 1974**

**BEFORE SUBCOMMITTEE NO. 3  
OF THE COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES**

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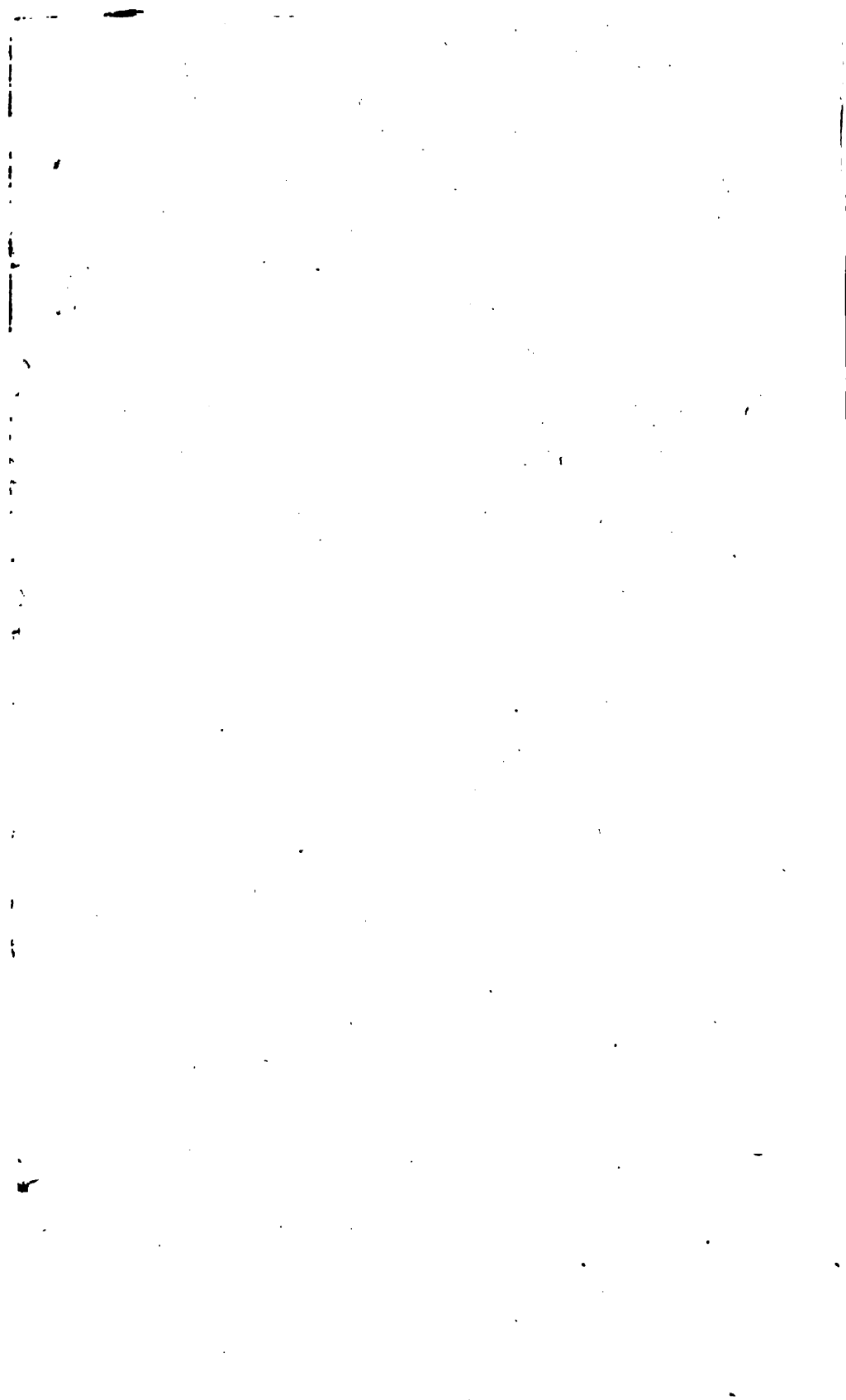
**60TH CONGRESS  
1ST SESSION**

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**WASHINGTON  
GOVERNMENT PRINTING OFFICE**

**1908**

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**AN ACT TO REGULATE  
COMMERCE, ETC.**

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**HEARINGS ON HOUSE BILL 19745**

**BEFORE SUBCOMMITTEE NO. 3  
OF THE COMMITTEE ON THE JUDICIARY  
U. S. C. HOUSE OF REPRESENTATIVES**

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**60TH CONGRESS  
1ST SESSION**

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**WASHINGTON  
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**1908**

HD 2773  
#908

**SUBCOMMITTEE NO. 3  
OF HOUSE COMMITTEE ON THE JUDICIARY.**

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CHARLES E. LITTLEFIELD, of Maine, *Chairman*.

GEORGE R. MALBY, of New York.

ROBERT L. HENRY, of Texas.

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## HEARING ON HOUSE BILL 19745, AN ACT TO REGU- LATE COMMERCE, ETC.

59TH CONGRESS,  
1ST SESSION.

H. R. 19745.

IN THE HOUSE OF REPRESENTATIVES.

MARCH 23, 1908.

Mr. HEPBURN introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

### A BILL

To regulate commerce among the several States or with foreign nations, and to amend the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," be, and hereby the same is, amended by adding at the end of said Act the following sections:

"SEC. 8. That any corporation or association affected by this Act, but not subject to the Act approved February fourth, eighteen hundred and eighty-seven, entitled 'An Act to regulate commerce,' or the Acts amendatory thereof or supplemental thereto, shall be entitled to the benefits and immunities in this Act hereinafter given, if and when it shall register as herein provided, and shall comply with the requirements of this Act, hereinafter set forth, but not otherwise.

"Such registration, by a corporation or association for profit and having capital stock, may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth such information concerning the organization of such corporation or association, its financial conditions, its contracts, and its corporate proceedings, as may be prescribed by general regulations from time to time to be made by the President pursuant to this Act; and such registration by a corpora-



tion or association not for profit and without capital stock may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth, first, its charter or agreement of association and by-laws; second, the place of its principal office, and, third, the names of its directors or managing officers, and standing committees, if any, with their residences.

"Thereupon the Commissioner of Corporations shall register such corporation or association under this Act. In case any corporation or association so registered shall refuse or shall fail at any time to file the statements or to give the information required under this Act, or to comply with the requirements of this Act, or in case information furnished by it shall be false in any material particular, the Commissioner of Corporations shall have power to cancel the registration of such corporation or association after thirty days' notice in writing to such corporation or association. Any corporation or association aggrieved by such action of the Commissioner of Corporations may apply to the supreme court of the District of Columbia, in a suit or proceeding in equity, for such relief in the premises as may be proper, and said court shall have jurisdiction to hear and determine such application, subject to appeal as in other causes in equity.

"Sec. 9. That the President shall have power to make, alter, and revoke, and from time to time, in his discretion, he shall make, alter, and revoke, regulations prescribing what facts shall be set forth in the statements to be filed with the Commissioner of Corporations by corporations and associations for profit and having capital stock applying for registration under this Act, and what information thereafter shall be furnished by such corporations and associations so registered, and he may prescribe the manner of registration and of cancellation of registration.

"Nothing in this Act shall require the filing of contracts or agreements of corporations or associations not for profit or without capital stock, and such corporations and associations while registered hereunder, and the members thereof, shall be entitled to all the benefits and immunities given by this Act, excepting such as are given by section ten and section eleven, without filing such contracts or agreements; but from time to time every such corporation or association shall file with the Commissioner of Corporations, when and as called for by him, a revised statement giving, as of a date specified by him, such information as is required to be given at the time of original registration under section eight of this Act.

"Sec. 10. That any corporation or association registered under this Act, and any person, not a common carrier under the provisions of the said Act approved February fourth, eighteen hundred and eighty-seven, or the Acts amendatory thereof or supplemental thereto, being a party to a contract or combination hereafter made, other than a contract or combination with a common carrier filed under section eleven of this Act, may file with the Commissioner of Corporations a copy thereof, if the same be in writing, or if not in writing, a statement setting forth the terms and conditions thereof, together with a notice that such filing is made for the purpose of obtaining the benefit of the provisions of this section. Thereupon the Commissioner of Corporations, with the concurrence of the Sec-

retary of Commerce and Labor, of his own motion and without notice or hearing, or after notice and hearing, as the Commissioner may deem proper, may enter an order declaring that in his judgment such contract or combination is in unreasonable restraint of trade or commerce among the several States or with foreign nations. If no such order shall be made within thirty days after the filing of such contract or written statement, no prosecution, suit, or proceeding by the United States shall lie under the first six sections of this Act, for or on account of such contract or combination, unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations; but the United States may institute, maintain, or prosecute a suit, proceeding, or prosecution under the first six sections of said Act for or on account of any such contract or combination hereafter made, of which a copy or written statement shall not have been filed as aforesaid, or as to which an order shall have been entered as above provided.

"No corporation or association for profit or having capital stock, and registered under this Act, that hereafter shall make a combination or consolidation with any other corporation or association, shall be entitled to continue its registration under this Act, unless without delay it shall file with the Commissioner of Corporations, pursuant and subject to the provisions of this section, a statement setting forth the terms and conditions of such combination or consolidation, together with a notice as hereinabove provided.

"SEC. 11. That any common carrier under the provisions of the said Act approved February fourth, eighteen hundred and eighty-seven, or the Acts amendatory thereof or supplemental thereto, being a party to a contract or combination hereafter made, or any other party to such contract or combination, may file with the Interstate Commerce Commission a copy thereof, if the same be in writing, or if not in writing, a statement setting forth the terms and conditions thereof, together with a notice that such filing is made for the purpose of obtaining the benefit of the provisions of this section. Thereupon the Interstate Commerce Commission, of its own motion and without notice or hearing, or after notice and hearing, as said Commission may deem proper, may enter an order declaring that in its judgment such contract or combination is in unreasonable restraint of trade or commerce among the several States or with foreign nations. If no such order shall be made within thirty days after the filing of such contract or written statement, no prosecution, suit, or proceeding by the United States shall lie under the first six sections of this Act, for or on account of such contract or combination, unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations, but the United States may institute, maintain, or prosecute a suit, proceeding, or prosecution under the first six sections of said Act for or on account of any such contract or combination hereafter made, of which a copy or written statement shall not have been filed as aforesaid, or as to which an order shall have been entered as above provided."

SEC. 12. That section seven of the said Act approved July second, eighteen hundred and ninety, is hereby amended so as to read as follows:

"SEC. 7. That any person who shall be injured in his business or property by any other person or corporation by reason of anything

forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

SEC. 3. That in any suit for damages under section seven of the said Act approved July second, eighteen hundred and ninety, based upon a right of action accruing prior to the passage of this Act, the plaintiff shall be entitled to recover only the damages by him sustained and the costs of suit, including a reasonable attorney's fee; and no suit for damages under said section seven of the said Act, based upon a right of action accruing prior to the passage of this Act, shall be maintained unless the same shall be commenced within one year after the passage of this Act.

Nothing in said Act approved July second, eighteen hundred and ninety, or in this Act, is intended, nor shall any provision thereof hereafter be enforced, so as to interfere with or to restrict any right of employees to strike for any cause or to combine or to contract with each other or with employers for the purpose of peaceably obtaining from employers satisfactory terms for their labor or satisfactory conditions of employment, or so as to interfere with or to restrict any right of employers for any cause to discharge all or any of their employees or to combine or to contract with each other or with employees for the purpose of peaceably obtaining labor on satisfactory terms.

SEC. 4. That no suit or prosecution by the United States under the first six sections of the said Act approved July second, eighteen hundred and ninety, shall hereafter be begun for or on account of any contract or combination made prior to the passage of this Act, or any action thereunder, unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations; and no suit or prosecution by the United States under the first six sections of the said Act approved July second, eighteen hundred and ninety, shall be begun after one year from the passage of this Act for or on account of any contract or combination made prior to the passage of this Act, or any action thereunder; but no corporation or association authorized to register under section eight of the said Act approved July second, eighteen hundred and ninety, as amended, shall be entitled to the benefit of this immunity if it shall have failed so to register, or if the registration of such corporation or association shall have been canceled before the expiration of one year after such registration, exclusive of the period, if any, during which such cancellation shall have been stayed by an order or decree of court subsequently vacated or set aside. Anything herein contained to the contrary notwithstanding, all actions and proceedings now or heretofore pending under or by virtue of any provision of the said Act approved July second, eighteen hundred and ninety, may be prosecuted and may be defended to final effect; and all judgments and decrees heretofore or hereafter made in any such actions or proceedings may be enforced in the same manner as though this Act had not been passed.

SUBCOMMITTEE NO. 3 OF THE COMMITTEE ON THE JUDICIARY,  
HOUSE OF REPRESENTATIVES,  
*Washington, D. C., Saturday, April 4, 1908.*

The subcommittee met at 10.30 o'clock a. m.

Present: Representatives Littlefield (chairman), Malby, and Henry, of the subcommittee.

Present also: Representatives Jenkins, Parker, Alexander, Tirrell, Sterling, Bannon, Diekema, Caulfield, and Reid.

Present also: Many representatives of those in favor of and those opposed to the bill under consideration.

The subcommittee thereupon proceeded to the consideration of the bill (H. R. 19745) "To regulate commerce among the several States or with foreign nations, and to amend the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.'"

The CHAIRMAN. Gentlemen, please come to order. The hour fixed for this hearing has gone by by nearly ten minutes and I am the only member of the subcommittee present. There are, however, three or four members of the Judiciary Committee present. If it is agreeable to the parties interested we will begin the hearing now; or, if it is desired, we will wait until other members of the subcommittee come in. It is entirely at your disposal. Mr. Low, I understand, represents the proponents of the measure.

In the first instance, is there anyone here who appears in opposition to the measure generally?

Mr. DANIEL DAVENPORT. I appear in behalf of the American Anti-boycott Association, in opposition to the bill.

The CHAIRMAN. Mr. Emery?

Mr. EMERY. I appear in behalf of some 135 associations in opposition to the bill, representing a national association of manufacturers, members of State, local, and other associations.

The CHAIRMAN. Mr. Monahan?

Mr. MONAHAN. I represent the National Founders' Association.

The CHAIRMAN. If you three gentlemen will confer together, if it is agreeable to you, and arrange upon some one gentleman to manage the details before the committee in opposition, I will then consult both you and Mr. Low as to the manner in which the hearing shall proceed—that is, as to the order. If Mr. Emery, Mr. Monahan, and Mr. Davenport can arrange among themselves so that one of these gentlemen can speak for all, then I will see what arrangement can be

made between them and Mr. Low as to the order of the hearing. We can arrange those details before the other members of the committee come in.

Mr. DAVENPORT. Is it the understanding that the proponents are to go ahead?

The CHAIRMAN. I presume so. Who will represent the opponents—Mr. Davenport or Mr. Emery, or—

Mr. EMERY. We agree on that.

The CHAIRMAN. You agree on Mr. Davenport?

Mr. EMERY. Yes.

The CHAIRMAN. Very well. Mr. Davenport, will it be agreeable to your people for Mr. Low to proceed in the first instance, inasmuch as he represents the people urging the passage of the bill?

Mr. DAVENPORT. Certainly.

The CHAIRMAN. Mr. Low, what arrangements would you like to make with reference to the order in which the hearing shall proceed? Would you like to be heard first and exhaust all you may have to say affirmatively, and then hear what the other gentlemen have to say in the way of objection, and then reply; or would it be more agreeable to alternate back and forth? Anything that will suit your convenience will suit the convenience of the committee.

Mr. Low. I think it would be more instructive and helpful if we alternated back and forth, if that is agreeable to Mr. Davenport.

Mr. DAVENPORT. They have a great number of gentlemen here who want to be heard in favor of this measure, and I suppose the orderly way would be to have what anybody has to say in favor of it said first; and that we could ask an opportunity to be heard in reply.

The CHAIRMAN. I suppose that would be the orderly method. Would it be agreeable to you, Mr. Low?

Mr. Low. If we can have an opportunity to reply after the objections have been urged, yes. We certainly feel that we are entitled to that in one form or another.

The CHAIRMAN. Of course, the committee has not yet taken any action upon that, but my own notion about it is that the committee will be disposed to hear everybody who is interested in the measure and that the persons who appear for the bill certainly ought to have an opportunity to reply to those who appear in objection thereto. So, if it is agreeable, we will proceed with Mr. Low's people, who are in favor of the bill, in the first instance, and then the parties who are in opposition may be heard; and then later on you may be heard in reply.

Mr. DAVENPORT. Is the hearing to be confined to to-day?

The CHAIRMAN. That is a matter that has not been determined. I should doubt very much if it was. As far as I am personally concerned, I am willing to sit right through to-day and through Monday and Tuesday, and more than that if it is necessary. Of course, we would expect the hearing to be confined within reasonable limits.

Before the hearing begins I will read some telegrams that have been sent to me, so as to get them into the record. I will read them as a part of the hearing:

Such political jugglery as represented by Hepburn bill to amend the Sherman law will, if persisted in, destroy all remaining confidence in the Administration and turn the country over to the Democrats.

THE KINNARD MANUFACTURING CO.

For obvious reasons this association protest against Hepburn bill amending Sherman antitrust law.

DAYTON EMPLOYERS' ASSOCIATION.

For God's sake spare us such legislation as is proposed by the Hepburn bill, No. 19745.

DAYTON MANUFACTURING CO.

This company believes passage of Hepburn bill to amend the antitrust law will shake the people's confidence in the stability of our Government.

THE BARNEY & SMITH CAR CO.

If the Hepburn bill amending Sherman Act is passed, we believe the people will repudiate the Republican party at the next election.

THE DAVIS SEWING MACHINE CO.

We can conceive of no legislation more disastrous to business interests and to the welfare of this country than would be the Hepburn law if enacted.

THE PLATT IRON WORKS CO.

We protest against proposed Hepburn amendment to Sherman Act, as one of the most vicious pieces of legislation ever put before the American Congress.

THE BROWNELL CO.

The Hepburn measure is a vicious conspiracy and must not become law.

THE COMPUTING SCALE CO.

Record our emphatic protest against Hepburn amendment to Sherman anti-trust law.

THE BUCKEYE IRON AND BRASS CO.

Passage of the Hepburn bill will kill the Republican party next fall, we fully believe, and it should.

THE W. P. CALLAHAN CO.

We desire to enter our protest against Hepburn amendments and condemn the originators who are proposing such infamous legislation.

THE DAYTON GLOBE IRON WORKS.

Business interests of this community bitterly indignant over Hepburn bill. We protest against favorable report by your committee.

CRAWFORD MCGREGOR & CANBY CO.

The following letter is directed to me:

[International Association of Master House Painters and Decorators of the United States and Canada.]

SOMERVILLE, MASS., March 30, 1908.

DEAR SIR: I learn that there are to be hearings on April 4 on the Hepburn bill (H. R. No. 19745), and as secretary-treasurer of the above association, and on its behalf, I write to protest against the bill as a whole, and especially the second paragraph of section —, which I believe would legalize the boycott. It seems to me that the enactment of any such law would be positively class discrimination, and I can not see why one class of citizens should be exempt from the provisions of such a law, made by our National Congress. I remain,

Yours, respectfully,

WILLIAM E. WALL, Secretary-Treasurer.

I will say, gentlemen, that so far as anything of any character comes into the possession of the committee I will see that it is put in and made a part of the hearing. That is, everybody is entitled to the possession of information that comes into the possession of the subcommittee. That is the view the subcommittee takes of it. Now, Mr. Low, you may proceed.

**STATEMENT OF SETH LOW, ESQ., PRESIDENT OF THE NATIONAL CIVIC FEDERATION.**

Mr. Low. Mr. Chairman and gentlemen of the committee, there was held in Chicago last October a conference upon trusts and organizations, which was called under the auspices of the National Civic Federation. The membership of that congress was composed of delegates appointed by the governors of 42 of the States of the Union and by over 90 commercial and agricultural and labor organizations. At that congress certain resolutions were adopted which have been presented to the House by Colonel Hepburn, and a subcommittee was appointed to see that they were presented to Congress. When we were making the arrangements for the presentation of those resolutions, through the courtesy of the Speaker, the subcommittee had the pleasure of meeting Mr. Jenkins, of this committee, and Colonel Hepburn, of the Interstate Commerce Committee, and as a result of that conference we were asked to propose a bill or bills. We were not under any instructions from the Chicago conference to do that, and the bill that we propose is not presented with the authority of that conference for that reason. But being called upon to prepare some legislative measure for consideration, the National Civic Federation, which had called the conference, took the matter up and this bill has been prepared after a very careful study of the subject and as wide conference with the different interests as it was practicable to secure within the limited time at our command. The committee therefore will understand that in offering this bill we are complying with the wishes of the chairman of the committee that we should present some definite legislation.

The CHAIRMAN. The wishes of the chairman of this committee?

Mr. Low. Yes.

The CHAIRMAN. Of the chairman of the Committee on the Judiciary and the chairman of the Committee on Interstate Commerce?

Mr. Low. Both of them asked us to prepare a measure.

The CHAIRMAN. Are we to understand that this measure follows the lines of their suggestion?

Mr. Low. Of the Chicago conference, yes; so far as it is practicable to do so, after consulting with the different interests concerned. We can not say that it identically does, because matters have come up since then that were not then under consideration, and in attempting to give definite form to the resolutions we have done as well as we could. I think there is nothing contrary to the resolutions in the bill.

The CHAIRMAN. Nothing contrary to what?

Mr. Low. Nothing in the bill contrary to the resolutions that were adopted at Chicago.

The CHAIRMAN. Oh, yes.

Mr. Low. They did suggest the appointment of a commission to study certain large phases of the subject, but it seemed to the Federa-

tion that it was better to propose a measure leading to immediate action.

The CHAIRMAN. Right there, Mr. Low, if there is no objection, who are the people that actually participated in the preparation of the bill? Who are the men who actually drew it?

Mr. Low. We conferred with Mr. Gary, of the United States Steel Corporation.

The CHAIRMAN. E. H. Gary, president of their board of directors?

Mr. Low. E. H. Gary, who is likely to be here this morning. He is in Washington, and I think he came on on purpose for this meeting. The lawyers actually engaged in the drafting of the bill were Mr. Stetson—

The CHAIRMAN. That is, Francis Lynde Stetson?

Mr. Low. Francis Lynde Stetson; and Mr. Morawetz.

The CHAIRMAN. Victor Morawetz?

Mr. Low. Victor Morawetz. Professor Jenks, of the Federation, was in constant collaboration upon the subject. We also kept in close touch with the administrative departments of the Government through the Bureau of Corporations.

The CHAIRMAN. That is, Mr. Herbert Knox Smith?

Mr. Low. Mr. Herbert Knox Smith; yes.

With your permission, I should like to read this general presentation of the subject, Mr. Chairman, and afterwards I would be very glad to answer any questions that may be submitted:

"The problem with which the bill introduced by Colonel Hepburn, and prepared under the auspices of the National Civic Federation, seeks to deal is not an easy one, but it may be stated very plainly. As a result of a long series of decisions by the Supreme Court of the United States it is at last made clear to everybody doing interstate commerce by the methods of combination which are characteristic of these times that much of such business is done contrary to law. Common carriers, business corporations, and business men, labor organizations and labor men, have all had it brought home to them, one after another, that under the terms of the Sherman antitrust law a large part of the business done in the United States at the present time is being done contrary to law. Cooperative associations and other associations of farmers are subject to the same statute.

"Common carriers should be permitted to combine and to make traffic agreements in proper cases and under suitable governmental supervision, for combination and traffic agreements often mean more effective service of the public. What is wanted is effective public supervision and not an absolute prohibition of the very thing that may secure the best public service. It is singular that a people who have constituted the greatest Republic in history by the combination of many States should, even for a moment, deny to its own commercial agencies the opportunity of giving better service by proceeding along the same lines. Regulation, not prohibition, should be our watchword in all such matters. There is scarcely a line of commercial business, if there be even one, in which combinations in restraint of trade are not sometimes desirable in these days in the public interest no less than in the interest of trade, for modern business is very complex and its problems are often trade problems as distinguished from individual problems. Organized labor is built up upon the rec-



ognized right to combine, to strike, and to make trade agreements. A law that raises doubt as to these rights for which labor has successfully contended in other countries, when it was a hanging offense to do so, strikes a blow not only at organized labor but at the whole structure of modern democratic society. The trade agreement which determines for a fixed period by mutual agreement of employer and of employee the rate of wages to be paid and the conditions of employment offers the most hopeful method which has yet been discovered to promote and to make permanent industrial peace under modern industrial conditions, and to classify such agreements as though they were contracts in restraint of trade would be a public calamity. The attempt of cotton growers, wheat growers, and other producers of farm products to protect themselves by combination against the combinations that deal in their products is just as certainly unlawful under the Sherman Act as the business combinations of which they complain, but even a law of the United States, powerful as this country is, can not set aside the universal law that leads men in these days to combine and which leads men to do so precisely in proportion as they are intelligent and free.

"As a further aggravation of the situation, the antitrust law is a penal one. Yet no one is able to be sure as to certain agreements whether they are unlawful or not. Anyone making an agreement of such a sort affecting interstate commerce and who does business under it, does it at his own risk; and long after the agreement has been made he may find out that he has rendered himself liable to imprisonment as well as to a heavy fine. I respectfully submit that this is a situation which is literally intolerable. It inevitably leads to a wide disregard of the statute upon the theory that "necessity knows no law;" because business to be done at the present time must be done by modern methods, and these often involve some restraint of trade. The preservation of our forests, for example, by agreement between the owners as to the amount of timber to be cut year by year is probably impossible under such a law, because such an agreement involves a restraint in trade. Beyond this, the statute itself constantly acts in restraint of trade, for the reason that only what is necessary is likely to be undertaken in the face of the penalties which the statute provides. A better method for sapping enterprise could scarcely be devised.

"How does it happen that a country like ours, renowned the world over for its freedom of initiative, finds itself in such a situation? If one goes far enough back in history, one reaches a time when even so simple a form of combination as a partnership was held to be illegal under the common law. In the interval, especially in this country, we have broken away so far from the original restraints of the common law concerning combinations as to encounter a new set of evils, chargeable, as many think, to the too great absence of restraint. Combinations in this country have been formed upon so vast a scale, and have so efficiently dominated one line of business after another, as to awaken a genuine fear in the minds of multitudes that the end of individual opportunity is in sight. Acting under such an impulse of apprehension, the Sherman antitrust law was passed in 1890. There is little evidence that the popular fear which placed this law upon the statute books has disappeared. The Sherman antitrust law, as

interpreted by the Supreme Court, reimposed, as it were, all the ancient restraints of the common law concerning combinations, and as to agreements in restraint of trade imposed even greater restraints, for the common law permitted such agreements as were reasonable, and this law has thus placed us, in fact, in the intolerable position already described. If, then, we can not endure the ancient restraints of the common law as to combinations nor the large freedom from restraint as to agreements in restraint of trade, which gave rise to the new evils that proved so alarming to the people, what shall we do?

There are evidently several possible courses: (1) The Sherman antitrust act might be repealed. Every man must judge for himself whether this is possible. To us of the National Civic Federation it seems at the present time out of the question. Popular opinion would not tolerate it. (2) The Sherman antitrust act might be amended, so that only contracts in unreasonable restraint of trade would be forbidden. This undoubtedly would remove the restraints complained of; but what does it offer to quiet the fears which placed the Sherman antitrust act upon the statute book and which keep it there? By many, such an amendment would be considered the equivalent of the repeal of the Sherman antitrust law. It must be admitted, if such an amendment were made, that it would be difficult to frame a law that would even bring about reasonable publicity. Such an amendment is evidently not in line with the President's recent recommendation. For all of these reasons such an amendment does not seem to us to offer the promise of immediate relief. (3) It is possible to propose the national incorporation of all organizations doing interstate business. Whether that plan may be adopted or not, in the future, no one can say. It will not be disputed that to-day, to use one of Gladstone's phrases, 'It is hardly above the horizon.' (4) The suggestion that everyone doing interstate business should be obliged to take out a national license is another way that has been suggested of dealing with the problem. The National Civic Federation believes that this method also is one as to which public opinion is not yet clear. A bill framed upon such lines would doubtless lead to an interesting constitutional discussion as to the precise limits of State and Federal control of commerce, and that would postpone the very relief that is so imperatively needed without delay. It has been said of the bill under discussion that it is in effect a license bill; but the very essence of the license system is that no one can do business who does not take out a license.

"This bill, on the contrary, is optional, and affects only those who voluntarily place themselves under it. I submit that this is a conservative method of testing how a bill upon new lines is likely to work. If it becomes a law, it is almost certain to lead to a large measure of publicity, and that, in the opinion of many, is likely to be the cure for most of the evils that have brought about too great legal restraint. If so, it will surely lead in the end to greater freedom from such restraints. The advantages of publicity are two-sided. Men whose corporate activities, within proper limits, are to be made matter of public record are likely to be careful not to do anything that they are not willing that the public should know. On the other hand, much of the criticism of corporations on the part of the people at large is due to the fact that they do not understand corporate methods

or corporate procedure. There is much reason to believe that publicity will make the criticism of corporate undertakings more intelligent, and therefore, in the main, more friendly. Rightly or wrongly, people believe that publicity means fair dealing with the public, and they are equally ready to believe, whether justly or unjustly, that secrecy means unfair dealing with the public.

"The National Civic Federation fully understands that there may be honest difference of opinion as to the general scheme of the bill under discussion, but while the bill may not escape criticism we believe it capable of vindication. The reasons why other alternative methods of escape from our present intolerable situation are not available, either now or in the near future, have already been pointed out. Let me now try to make clear the salient features of the Hepburn bill, which is offered as a practicable method of dealing with a situation which is confessedly exceedingly difficult.

"(1) The benefits and immunities offered by the bill are conditioned upon registration—for common carriers, with the Interstate Commerce Commission; for all others, with the Bureau of Corporations; and registration is optional. Therefore the bill affects only those who choose to register.

"(2) Registration can be denied to no one who gives the information called for by the bill; and no one can be deprived of registry arbitrarily, nor for cause without appeal to the courts.

"(3) All corporations and associations affected by the bill are divided into two classes, (a) those for profit and having capital stock, and (b) those not for profit and not having capital stock. The first class must give such information as may be called for by general regulations, to be prepared by the President, as to their organization, their finances, their contracts, and their corporate proceedings. The second class must file their constitutions and by-laws, the address of their head office, and the names and addresses of their officers and standing committees; but this distinction is not arbitrary. Corporations for profit appeal to investors for their money; corporations not for profit do not. At no other point in the bill is any distinction made between the two classes of corporations or associations. The clause relating to strikes and trade agreements is not an exception to this statement. That clause simply makes clear that certain correlative rights of employees and of employers are not affected by the Sherman antitrust law. The necessity for such a clause I shall speak of later.

"What, then, are the benefits to be derived from registration under this bill?

"(1) For the public, reasonable publicity, such as some corporations already give voluntarily.

"(2) For existing combinations and contracts in restraint of trade, the assurance that they will not be attacked by the Government, except upon the ground that they are in unreasonable restraint of trade; and as to everything done prior to the passage of the act a statute of limitations of one year is fixed. I ask you to notice, therefore, that this bill does establish the rule of reasonableness as to restraint in trade, so far as the past is concerned. This is fair because many such agreements were made before the Supreme Court had given its wide and sweeping interpretation to the antitrust act; and

it is wise, because it will lift a great load of anxiety off of men of all sorts, who would not willingly do anything contrary to the laws of the country. I doubt if there be any one thing that will do so much to revive business courage and enterprise at a time when both are so much needed.

"(3) For combinations to be formed hereafter, the bill provides that if not disapproved within thirty days (the President in his message suggests sixty days—the precise period is not important), these combinations can not thereafter be attacked except on the ground of unreasonableness.

"(4) Contracts or agreements in restraint of trade to be made hereafter need not be filed any more than they are now; but if they are filed, the same rule applies; that is to say, if not disapproved within a limited period, they can only be attacked on the ground that they are in unreasonable restraint of trade.

"I apprehend that this proposed grant to an administrative board or department of the power to disapprove combinations or contracts hereafter to be made is the critical feature of this bill. The first question that will be asked is: Why not adopt the same policy toward future combinations and contracts as toward existing ones, and provide that none shall be attacked except for being in unreasonable restraint of trade? The answer is that such a provision would compel us to go into the future with no other protection than the protection which has proved insufficient in the past to avert the very evils which have aroused the strong popular feeling that has placed the Sherman antitrust law upon the statute books and which keeps it there. With such a provision as to future contracts, it is doubtful whether this bill would even bring about publicity; and even if it were to do so, until it is proven by experience that publicity alone is a sufficient protection, it can not certainly be said that no other safeguard is desirable.

"The next question that will be asked is: Why should not the Government's failure to disapprove be final? The answer is that what is reasonable to-day may become, by the changes that time brings, unreasonable—say, five or ten years from to-day. The Government should not be prevented from questioning anything that is in unreasonable restraint of trade; but it may properly be compelled, as it is compelled under this bill, to assume the burden of proving the unreasonableness of which it complains.

"The third question that may be asked is, what redress have those whose combinations or agreements are disapproved by these administrative officials? It must be frankly said, none. I know of no way to secure a review in the courts of an administrative decision of this character. On the other hand, it must be pointed out that disapproval has no other effect than to leave such combinations and contracts under the Sherman antitrust law as it now stands; that is to say, in the position in which all combinations and contracts in restraint of trade now are. Is it worth while to keep all the business activities in the United States under the harrow because a few combinations or contracts may still be left there, with the possibility at least that they ought to be left there? I think our bill as submitted should be amended at this point so as to call for a written statement of reasons in every case of disapproval. This would tend to prevent arbitrary action, and it would often enable persons aggrieved by dis-

approval to modify their agreements so as to secure the withdrawal of the disapproval. Again, it seems worth while to run this risk of Executive disapproval for the sake of the gains that accrue if it is escaped. Those wishing to make combinations and contracts in restraint of interstate trade will learn in this way much more quickly than they can through the courts whether it is safe to make them; and combinations and contracts that successfully run this gantlet will command a quality of public confidence, including the confidence of investors, not to be had so easily in any other manner. Like all other administrative power, the power to disapprove is capable of being abused, but I ask you to notice the actual safeguards against abuse. First, the administrative officers can not interfere by inaction. The Government must take the responsibility of positively disapproving; and if it is also obliged to give reasons, those reasons will be passed upon in judgment by the whole country. Second, the Interstate Commerce Commission is a body of 7 men, trained in exercising such functions. The action of the Commissioner of Corporations must be approved by the Secretary of Commerce and Labor. The Secretary is a member of the President's Cabinet. It is not too much to say, therefore, that the positive, aggressive disapproval of a proposed combination or contract in restraint of trade would form a part of the public policy of the Administration, for which it would be held responsible by the country. Inaction can be maintained without sufficient knowledge on which to base criticism; but positive action by a Cabinet officer must be in the open, and must be capable of vindication.

“The clause relating to certain phases of trade disputes has been inserted in the bill with the purpose of quieting the fears of organized labor, lest even strikes and labor unions and trade agreements may be declared illegal under the Sherman antitrust act, as in restraint of trade. This fear is not wholly imaginary. Lawyers say, I know, that the Supreme Court in its recent decision has only condemned the boycott; and that, therefore, no such clause as this is necessary; but the members of trade unions scattered all over the country are not lawyers, neither have they lawyers at their elbows, and they are, in great numbers, subject to this fear. Neither are lawyers always right in such opinions; for I remember that many lawyers were confident that the Sherman antitrust act did not apply either to common carriers or to labor unions. But the Supreme Court has ruled that the law applies to both. This clause, therefore, is not only just, but it is in the highest degree important, in order to set at rest the minds of literally hundreds of thousands of men that their recognized right to strike, to combine, and to make trade agreements with their employers is not open to question. The correlative right of employers to discharge, to combine, and to make trade agreements with their employees must evidently be equally conserved. The precise clause is as follows:

Nothing in said act approved July 2, 1890, or in this act is intended, nor shall any provision thereof hereafter be enforced so as to interfere with or to restrict any right of employees to strike for any cause, or to combine, or to contract with each other or with employers, for the purpose of peaceably obtaining from employers satisfactory terms for their labor, or satisfactory conditions of employment, or so as to interfere with or to restrict any right of employers for any cause to discharge all or any of their employees, or to combine, or to contract with each other or with employees for the purpose of peaceably obtaining labor on satisfactory terms.

"This clause, you will perceive, merely limits the purpose and effect of the antitrust law, and does not assume to render lawful any action that prior to the passage of the antitrust act would have been unlawful. Laborers had no right prior to the passage of the antitrust act to combine or to contract for the purpose of effecting a boycott or of injuring others, and the proposed amendment confers no such right. The only effect of the amendment is to provide that the antitrust act shall not have the effect of preventing employees from exercising their right to strike, that is to say, refusing to work, for any cause; or the right to combine or to contract with each other and with employers for the purpose of peaceably obtaining from employers satisfactory terms, etc. The correlative rights of employers to discharge their employees and to combine and to contract with each other and with their employees are equally recognized. A boycott or a black list or a combination or contract for the purpose of injuring others would continue to be as unlawful as at common law, and would continue to be in violation of the antitrust act if in restraint of interstate commerce."

That, at least, Mr. Chairman, is what is intended and what we think that clause means. If the only difference of opinion as to it is as to whether it means that or not, I submit it is very easy to make it mean that by proper amendment.

The CHAIRMAN. I infer from the latter part of your statement that you would not favor any legislation that authorized an interstate boycott.

Mr. Low. None whatever.

The CHAIRMAN. And if the measure is open to that construction you should want to see it changed?

Mr. Low. Yes, sir; I would be entirely willing to see it changed. We neither authorize a boycott nor a blacklist—neither one nor the other.

The CHAIRMAN. You would not want to affect in any way the effect of the decision in the Loewe case, which is the boycott case?

Mr. Low. What is that?

The CHAIRMAN. I say you would not want, by legislation, to affect in any way the effect of the decision in the Loewe case? You would not want to affect by legislation the decision in the recent Danbury hat case?

Mr. Low. No, sir; I think so far as the boycott was concerned that that decision ought to be sustained, and ought to be made the law of the land. But that decision has created, if I may say so, the social problem that I have endeavored to make clear. The Supreme Court condemned the boycott, but it founded its condemnation on three elements: On the strike at the factory, on the trade agreements by which 70 out of 82 hat factories had been unionized, and then on the boycott of the merchandise all over the United States.

In saying who had been conferred with in regard to this bill, at the outset, I omitted to mention Mr. Gompers and other men associated with the labor movement. They are here to speak for themselves.

The CHAIRMAN. I beg your pardon. I did not get that.

Mr. Low. In speaking of those who had been conferred with in connection with the bill, I also ought to have stated that it had been

a matter of consideration at an executive meeting of the Federation, where different trades in New York had been represented.

To come back to that hatters' case, if I may, Mr. Gompers has never said to me, at any point in connection with this movement, that the labor unions want to be free to indulge in a boycott. What he has said (and he is here to correct me if I am mistaken) is that he thinks that the labor unions ought to be entirely removed from the Sherman antitrust act; that labor is so different in its nature from the products of labor that it is very difficult, if not impossible, to legislate under the same law for the two things, and to deal wisely.

The CHAIRMAN. If they were removed from the operation of the Sherman antitrust law they could undoubtedly engage in interstate boycotts. There would not be any question about that, would there?

Mr. Low. I am not a lawyer and I can not answer that question.

The CHAIRMAN. There would not be any question about it, would there?

Mr. Low. But we are not suggesting that.

The CHAIRMAN. You are not urging that?

Mr. Low. No, sir.

The CHAIRMAN. You are not in favor of it?

Mr. Low. For this reason: The line that we draw in the Civic Federation, so far as I am able to speak for it, is exactly this: That we think labor's claim to be exempted from the Sherman antitrust law, so far as it relates to production, is a good one, and that is the reason why we think this clause relating to strikes and to trade agreements properly belongs in this bill. We think that is a sound claim; but when labor undertakes to deal with the distribution and sale of the finished product, as it does in a boycott, it seems to us that it leaves the sphere of labor and enters into the field of restraint of trade just as distinctly as any trust may do it. That is why we think the Sherman antitrust law should be maintained with reference to boycotts and also with reference to blacklists. We do believe it is right, and we not only think it is right, but wise and necessary in the public interests, to make it perfectly clear that the Sherman antitrust law in the future is not to have any bearing on the fact of combinations into unions, nor on the fact of striking, nor on the fact of trade agreements.

The CHAIRMAN. But if the strike is in pursuance of a criminal conspiracy to restrain interstate trade, that would raise another proposition in your mind, I suppose, would it not?

Mr. Low. I understand that the United States circuit and district courts have abundantly recognized the right to strike for any cause.

The CHAIRMAN. Lawful or unlawful?

Mr. Low. The phraseology of some of the judges is as broad as I have indicated.

The CHAIRMAN. That is, lawful or unlawful?

Mr. Low. The phrase is, "any cause at all."

The CHAIRMAN. And that would include lawful or unlawful. Will you submit to the committee, so that we can have it for our consideration, any cases where circuit or district courts or the United States Supreme Court have held that a combination for a lawful or an unlawful purpose is authorized by the Sherman antitrust law or at the common law—so that we can have it before us?

Mr. Low. I will do so with pleasure. Meanwhile I should like to call the attention of the committee to this case of *Allis-Chalmers v. Moulders' Union* (150 Fed. Rep., 155, 171). In that case Judge Sanborn says:

The right to strike for any cause or no cause is clear and fully sustained by all authority. Even a conspiracy to strike, followed by legal damage, is not unlawful if formed to better labor conditions. The right of workmen to combine in trades unions, in order to secure the economic advancement of their members, is also unquestioned; and such unions are generally regarded as beneficial institutions for bettering the conditions of labor and the relations between employer and employee.

Then he discusses the right to strike:

The right to strike being clear, the first question which comes up is: How far may the union and its members go to make the strike effective by preventing the employer from engaging other workmen, so that he will eventually be compelled to yield to the demands of the strikers? This is usually the pinch of the situation. Here is the point where two equally clear and valuable constitutional rights come into opposition—the right of the workman to get as much as possible for himself on the best terms, and the right of the employer to use his capital and ability as he pleases to secure whatever profit his investment and skill may bring. The legal right involved is single, but asserted by two independent and conflicting interests; and the question is, which one must yield his right to that of the other, so far as they conflict.

I have here a series of other decisions in which the right to strike, as I say, either with or without cause, is abundantly sustained.

The CHAIRMAN. My question was: For an unlawful cause.

Mr. CAULFIELD. Does not any cause include unlawful cause?

The CHAIRMAN. The chairman thinks he understands his own question. He has not any question about it, and is anxious to see a case that holds that anybody can conspire for an unlawful cause, within the limits of either the common law or any Federal law.

Mr. Low. The point of our amendment, Mr. Chairman, is that we leave it just where the law is. That is what it is intended to do, and what we think it does. We think it does not interfere with any right they have. It does not grant any right, and it does not interfere with any right they have.

The CHAIRMAN. You mean that you believe the amendment is simply declaratory of the law as it would stand, and is not affirmative in its character, and does not go beyond the existing law; or, do you mean that it simply announces what you believe is the common law?

Mr. Low. Of course the amendment does say that nothing in the Sherman antitrust act shall interfere with any right they have to do those things, but they do not get the right from this clause. If the right does not exist by the common law or by the statute law, they have not got it.

The CHAIRMAN. In other words, do we understand that you do not expect to accomplish anything affirmatively by section 3, except to declare the law as you understand it to-day exists?

Mr. Low. That is all.

The CHAIRMAN. Mr. Low, I want to inquire about another matter. I notice that you refer to the fact that a large part of the business now being done in this country is being done contrary to the law. What do you mean by that?

Mr. Low. I mean that, according to my best knowledge and belief, almost all business involves some restraint of trade when it is done under modern conditions.



The CHAIRMAN. Can you give us any specific illustration, so that we can have a concrete case and so that we can take the facts and predicate our views upon them?

Mr. Low. No; I can not.

The CHAIRMAN. I presume that these attorneys can do that for us—Brother Stetson and Brother Morawetz.

Mr. Low. Possibly.

The CHAIRMAN. You say that refers to reasonable restraints of trade at common law. Upon what condition do you understand the reasonableness or unreasonableness of the common law is predicated?

Mr. Low. I do not know that there is any fixed rule. I suppose the courts decide as to any cause whether it is reasonable or not.

The CHAIRMAN. What sort of a condition does the terms "reasonable" and "unreasonable" at the common law mean? I do not know that you are familiar with that, though.

Mr. Low. No; I am not a lawyer.

The CHAIRMAN. You have some attorneys here, I suppose?

Mr. Low. Yes.

The CHAIRMAN. Because I would like to inquire of some of your attorneys who have been advising in relation to the language of the bill as to some of the legal propositions.

Mr. Low. Of course the attorneys can advise you as to the language of the bill, but you must not hold them responsible for my statement, which is a layman's statement.

The CHAIRMAN. No; but they will have no objection to coming before the committee and giving us legal information.

Mr. Low. I suppose not.

The CHAIRMAN. If we are to have them later on, I will not ask you about that, because I see that you are not familiar with it. I will ask you this, however: Do you understand as a matter of fact that a very large part of the business is now being done contrary to the law?

Mr. Low. I believe it involves restraint of trade—if that is contrary to the law.

The CHAIRMAN. Has anybody been embarrassed by reason of that condition? Has the Department of Justice prosecuted anybody for the continuous violations of the law, if they exist?

Mr. Low. They have certainly prosecuted some people.

The CHAIRMAN. Have they prosecuted the people you have in mind when you speak of the largest part of the business of the country being done in violation of the law? Have those people been prosecuted?

Mr. Low. I think, Mr. Chairman, that if the Attorney-General were to attempt to prosecute all who are doing business in restraint of trade, it would be like what Burke said was impossible—to indict a whole nation.

The CHAIRMAN. Have you in mind a single instance where the Attorney-General of the United States has undertaken to enforce the provisions of the Sherman antitrust act, under these conditions—in one single instance?

Mr. Low. Mr. Schieffelin can answer that better than I can.

The CHAIRMAN. We will hear him later. He can go over that later on.

Mr. Low. Yes, sir.

Mr. CAULFIELD. May I ask a question, Mr. Chairman?

The CHAIRMAN. Yes.

Mr. CAULFIELD. How many members has the National Civic Federation? How is it constituted?

Mr. Low. The National Civic Federation has no membership list at all that is based upon subscription; but it is constituted of men of large business interests and also of men connected with the labor movement, from all parts of the country. I think it has accomplished what no other organization has accomplished. It has provided a platform upon which men of large means and doing large business meet together with men representing organizations of labor and who look at problems from other points of view. They meet and discuss and give each other the benefit of their views.

Mr. CAULFIELD. Has it a fixed membership?

Mr. Low. Not in the sense of a membership founded upon subscriptions; but we could easily furnish the committee with the names of the counsel and the executive committee.

Mr. CAULFIELD. Is its membership known? That is what I am trying to get at. Could their names be furnished?

Mr. Low. No; because it does not depend upon subscription. We could furnish the names of the active committees, and will do so with very great pleasure.

Mr. CAULFIELD. Do they just call them together from time to time for conferences?

Mr. Low. Yes.

Mr. CAULFIELD. It is a shifting and changing body, then?

Mr. Low. Yes; and each member supports what commends itself to himself and does not support what he does not believe in. does not support what he does not believe in.

The CHAIRMAN. I notice that the bill, in terms, applies to the first section of the Sherman antitrust law, and in the first, second, third, and sixth, which are the affirmative provisions of that statute, defining the conditions to which it applies, conspiracies are prohibited. If the bill becomes a law, we shall have to determine what a reasonable conspiracy is against trade, or a reasonable conspiracy to monopolize trade. I do not know whether you have examined that matter yourself, and if not I would not ask for an answer; but if you have, so that you have a definite idea as to what a reasonable conspiracy against trade is—interstate trade—I would be very glad to have you give it to the committee, so they will have the benefit of your idea.

Mr. Low. I do not know what a reasonable conspiracy against trade is, and I do not know what a reasonable restraint of trade is.

The CHAIRMAN. Very well. I will not push it.

Mr. Low. Nobody knows in advance of a determination by the Supreme Court.

The CHAIRMAN. Are we to turn this whole question over to Herbert Knox Smith (who does not know, by the same token, what a reasonable conspiracy against trade is) without knowing what he is going to say?

Mr. Low. I should think not.

The CHAIRMAN. Does not the bill do that?

Mr. Low. I think not.

The CHAIRMAN. Very well.

Mr. JENKINS. Mr. Chairman, while Mr. Low is here I want to ask him a question, with your permission.

The CHAIRMAN. Certainly.

Mr. JENKINS. Just now, as I remember, Mr. Low was speaking of who was present in the Speaker's room, and then Mr. Littlefield asked a question as to my connection with it. I want to say that if later I am asked what was said pro and con in reference to this bill, I should have to say that nothing was said while I was present.

Mr. Low. I did not—

Mr. JENKINS. And that possibly I was not present to exceed five minutes, and I should say not to exceed three. I remember that Mr. Gompers was there and Professor Jenks; but you say that as the result of the conference at which I was present this bill was drawn, so I should say hereafter, if I was asked the question, that there was not a word said about the bill when I was present.

Mr. Low. Not this bill; but I certainly understood you to say that if we wanted a hearing we must prepare a bill.

Mr. JENKINS. The Speaker said that you gentlemen had in preparation a bill, or some bills, and I remarked that we did not draw any bills; that I could not draw this bill; but that if you gentlemen drew a bill and it was introduced and sent to our committee, I assured you that you should have a hearing; and that was the extent of it, was it not?

Mr. Low. Oh, yes.

Mr. JENKINS. I thought from Mr. Littlefield's question that he wanted to know what participation I had in the conference or in the bill.

Mr. LITTLEFIELD. I am very glad to have had that cleared up. I got the impression that the chairman of the Judiciary Committee and the chairman of the Interstate Commerce Committee substantially indicated the lines upon which the bill was drawn. I evidently got a wrong impression.

Mr. Low. I did not intend to give that impression at all. I merely meant to relieve the Civic Federation of the charge of usurping any of the functions of Congress. We do not look upon ourselves as legislators, and probably should never have presented any measure on this subject at all except that in the conference that the Judge has referred to, and a similar conference with the chairman of the committee in the Senate, we were told that if we wanted to have anything considered from a legislative point of view it must be submitted in the form of a bill. None of those gentlemen ought to be held in any way responsible for the subject-matter of the bill.

The CHAIRMAN. I think I speak for the committee when I say that it is perfectly legitimate for any gentleman to present any kind of legislative matter to this body and for the body to consider it. You need have not the slightest embarrassment about that.

Mr. Low. That was what I had in mind when I gave that piece of history. The Civic Federation has not any interest in this matter whatever but the endeavor to find some way out of a situation that we believe is working injury to the entire country all the time; and while we are perfectly aware that this bill of ours contains propositions that are novel, we also think that because it is an optional bill it offers a conservative way of testing that question. The real prob-

lem—I am not speaking as a lawyer, but as a layman—seems to me to be this:

We have a law that forbids everything in restraint of trade, reasonable or unreasonable, and it is my opinion and, I think, that of a great many, that that is doing injury to the country as long as it remains unmodified. On the other hand, the fear that put that statute on the books still exists, and the question is whether any way out can be found that does not provide some sort of agency by which to pass upon future combinations, or to protect society, if you please, from the evil results of future combinations and future contracts in restraint of trade, such as have aroused the fear that put that statute on the books. I do not think that a law that does nothing but restore the old status quo is going to be satisfactory. Possibly it is, but it is a mere question of judgment. But that is the idea which has resulted in the preparation of a bill along these lines. We perfectly well understand that the suggestion that an administrative department (whether the Interstate Commerce Commission or the Bureau of Corporations) should have anything to say about such things is a novel one, but as regards general business we have come very closely up to the same point we had reached when the Interstate Commerce Commission was established.

That commission dealt originally with the railroads, but it has been extended to deal with all classes of common carriers. I do not myself consider it important whether the power to make such a decision is given to the Commissioner of Corporations or whether there is a commission created, or whether the whole thing is turned over to the Interstate Commerce Commission. There are a great many details of that kind as to which we are utterly indifferent. My point is that I do not see any path of progress except along a line that does for the general business of the country just what was done by Congress for the common carriers by the Interstate Commerce Commission—set up some sort of machinery that can protect the people in advance, if you please, against what is evidently wrong, instead of being obliged to try to right wrongs after they are committed. Whether this is the best plan or not, we have not so much assurance as to assert.

Mr. ALEXANDER. Have you studied the Australian law touching this question of restraint of trade?

Mr. LOW. No, sir; I have not.

Mr. ALEXANDER. Has any member of your Civic Federation made a study of that law, to your knowledge?

Mr. LOW. Not to my knowledge. Do you know Mr. Jenks?

Mr. JENKS. I have studied it somewhat.

Mr. ALEXANDER. Did you read, Mr. Low, an article in the Outlook of last week or week before? I do not recall now the author of the article—

A BYSTANDER. Mr. Post, of Chicago.

Mr. ALEXANDER. Mr. Post, of Chicago. Did you read that article?

Mr. LOW. No, sir; I did not read it.

We are not set on our particular method, but it has, at least, this merit: It is a proposal to do something. This is constructive, and it may be changed out of all recognition before anything is done; but I want the committee to understand that the motive of the Civic Federation is to find a way out of our difficulties, and this particular

suggestion is, it seems to us, the most likely to be practicable. We think it is a conservative measure, notwithstanding its radical provisions, because it is optional. Nobody is obliged to pay any attention to it if they do not want to. If they do, I think it will result in a very large measure of publicity, and I am one of those who think that that is likely to be the only balance wheel that is needed. At any rate, there is great hope for it. I think nothing is more striking than the difference in the attitude of the public toward these great combinations which give publicity and those which do not, and this bill, I think, has that merit. At least, we do offer a constructive suggestion. Anything can be criticised and inaction is very easy. The point I want to impress upon the committee is that inaction is very costly to the country, and therefore I think action of some sort ought to be had. Surely we would not present the bill if we did not think it was capable of operation. We think it is. We think that the fears that are indicated as to its operation are very much exaggerated. I think some sort of thing—

Mr. REID. May I ask one question?

The CHAIRMAN. Yes.

Mr. REID. Mr. Low, in the written statement you refer to the authority of the courts in certain instances, to review—

The CHAIRMAN. I do not hear you, Mr. Reid.

Mr. REID. I say Mr. Low said something in the written statement a few moments ago relating to the authority of the courts to review the question as to the reasonableness or the unreasonableness of these contracts. I did not get that clearly, and I want to understand it.

Mr. Low. Mr. Chairman, the vital feature of the bill is the question of being upon the registry. Those who are on the registry get the benefits and immunities of the bill. The point I tried to make was that there is no opportunity for arbitrary action at that point as to either getting on or getting off the registry. Anyone gets on the registry, and must be put on it, who answers the questions prepared by the President or through the bill. On the terms stated in the bill nobody can be denied registry, and therefore nobody can be denied the benefits and immunities of the bill. If the proposition is made to remove anyone from the registry, and the person feels aggrieved, he can only be removed for the causes stated in the bill itself; but if the person feels aggrieved by that proposition, he has an appeal to the supreme court of the District of Columbia.

Mr. REID. Would that involve questions as to the reasonableness or unreasonableness of contracts or other regulations?

Mr. Low. No, sir.

Mr. REID. That would be entirely for the Commissioner of Corporations or the Secretary of Commerce and Labor?

Mr. Low. That simply relates to the status of the corporations with reference to this bill. The point I want to make clear is that while no corporation or association is compelled to register, nobody can be prevented from registering, and therefore be deprived of the privileges of the bill by arbitrary power. Having registered, the bill has its face toward the past and toward the future. Toward the past the Government undertakes that no new suit, if the bill becomes a law, shall be begun except on the ground of unreasonableness in restraint

of trade. A statute of limitations of one year is fixed. So far as the future is concerned there is only one class of contracts or agreements that have to be filed, and those are contracts to bring about new combinations. If half a dozen existing companies—

The CHAIRMAN. In a hurried reading of this bill I do not notice anything in which it authorizes individuals to register; and if they can not register they can not get immunity. The only people you provide immunity for, then, are corporations and associations. Why should not individuals have the privilege of entering into reasonable conspiracies and monopolies as well as corporations and associations?

Mr. PARKER. Having made a contract, are they not associations?

The CHAIRMAN. No.

Mr. LOW. I do not know of any reason why they should not.

The CHAIRMAN. The bill does not provide for that. Does it, in your view? Of course this is a hurried reading.

Mr. LOW. I do not know that my own thought has been attracted to that; at least, that my thought has been drawn to that particular feature.

The CHAIRMAN. You have had in mind the corporate feature?

Mr. LOW. Yes; because I do not think very much is done by individuals in the way of restraint of trade in these days. I think it is all done by corporations or associations or organizations of some kind. Mr. Morawetz calls attention to the fact that section 10 reads—

that any corporation or association registered under this act, and any person, not a common carrier under the provisions of the said act approved February fourth, eighteen hundred and eighty-seven, or the acts amendatory thereof or supplemental thereto, being a party to a contract or combination hereafter made, other than a contract or combination with a common carrier filed under section eleven of this act, may file with the Commissioner of Corporations,

In other words, the privilege of having their contracts passed upon is offered to individuals.

The CHAIRMAN. I do not know but that does cover it.

Mr. HENRY. Let me ask you a question or two. I did not hear quite all of your statement, as I did not come in until after you had started, but I understand one of your propositions to be that the Civic Federation would like to see the Sherman antitrust law of 1890 repealed, and that that would be one of the remedies. Am I correct in that?

Mr. LOW. You are not quite correct. I did not say that the Civic Federation would like to see it repealed. I said that that was a conceivable remedy, but that we did not think public opinion was ready for it.

Mr. HENRY. Are you in favor of it as an abstract proposition? Are you in favor of the repeal of the Sherman antitrust law?

Mr. LOW. That is simply a personal view—

Mr. HENRY. I would like to have that.

Mr. LOW. I do not think I should answer a hypothetical question as to whether I think it ought to be repealed. If I were asked as a matter of fact, whether it could be, I should say no.

Mr. HENRY. I will ask this question, then. Does this bill weaken the Sherman antitrust law in any of its features?

Mr. Low. It provides a method by which certain combinations and contracts can be passed upon, or can be entered into, if not unreasonable.

Mr. HENRY. But you understand that it does modify the terms of the Sherman antitrust law in some respects?

Mr. Low. Precisely; it is intended to.

Mr. HENRY. I did not catch the names of those in the conference, or where the conference was, a while ago. I did not get the names of those who agreed on the terms of the bill, and prepared the bill. Where was the conference, and who were those engaged in it?

Mr. Low. The conference was held in New York City, where the headquarters of the Civic Federation are. It is quite impossible to name all who were engaged in it, but I suppose there were fifteen or twenty.

Mr. HENRY. I mean the conference that Brother Jenkins referred to a while ago.

Mr. Low. Oh, that was in the Speaker's office here.

Mr. CAULFIELD. The merits of the matters were not discussed there, were they?

Mr. Low. Not at all. The conference in the Speaker's office simply had to do with getting a hearing before the committee.

Mr. HENRY. Looking toward some sort of legislation.

Mr. Low. Yes, sir.

Mr. HENRY. That is all I care to ask.

Mr. DAVENPORT. May I ask a question?

The CHAIRMAN. Yes.

Mr. Low. Certainly.

Mr. DAVENPORT. Of course I do not want to take up time.

The CHAIRMAN. If it is agreeable to Mr. Low, of course. If any person making a statement does not care to be interrupted, his wishes should be respected in that regard; but if it is agreeable to Mr. Low, you may proceed.

Mr. Low. Our motive is simply to get action in the public interest. We are ready to answer any questions we are able to.

The CHAIRMAN. Then, I understand it is entirely agreeable to you?

Mr. Low. Entirely.

Mr. DAVENPORT. I only want to ask a question or two. So far as a private party is concerned, who may be injured by any combination in restraint of trade, except so far as it is covered in the relations of the employer and employee, as I understand it, the only change made is that the amount of damages to be recovered are single instead of treble. Am I correct in that?

Mr. Low. That is all, so far as I know, sir.

Mr. DAVENPORT. That is to say, the present language of the statute remains in force; every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, whether reasonable or unreasonable, is unlawful; and that any private party who is injured by any such combination, whether the combination is a reasonable one or an unreasonable one, has still his right of action?

Mr. Low. I understand the bill does not attempt to change the status of the private party under the Sherman antitrust law, except as to the question of damages.

Mr. DAVENPORT. Was that intentional?

Mr. Low. Yes, sir.

Mr. DAVENPORT. So that the people who enter into these agreements with the permission of the Commissioner of Corporations, or whoever he is, are still breaking the law, and are subject to an action by any person aggrieved by them. Is not that true?

Mr. Low. Well, that is a legal question that I find it difficult to answer.

Mr. DAVENPORT. Was not that the intention of the bill?

Mr. Low. The intention was not to interfere with the rights of private persons.

Mr. DAVENPORT. Under the existing law?

Mr. Low. Under the law, except to reduce the damages from three-fold to single damages.

Mr. DAVENPORT. Yes. So that you make a distinction here in this bill between actions brought by private parties who are injured, to recover damages under the seventh section, and suits brought by the Federal Government, either to restrain them or to prosecute them criminally. That is so, is it not?

Mr. Low. I think that might be a proper point.

Mr. DAVENPORT. And that was intentionally done, was it not?

Mr. Low. The intention was not to interfere in any way with the rights of private parties.

Mr. DAVENPORT. What reason is there for such a distinction as that? Why should these people be permitted to go on and do these things, and be subject to private action, and at the same time the Government be deprived of all power to restrain them, if it becomes necessary?

Mr. Low. The only reason, Mr. Chairman, that I know of is that it did not seem to be possible to deprive private parties of their right of action. We did not try to do it. We did try to cut down the damages to the common-law rule of single damages.

The CHAIRMAN. Do you mean to be understood as saying that you have approximated the rule of damages in this case to the common-law rule?

Mr. Low. I do.

The CHAIRMAN. I will suggest that at common law there is no question about the right of a plaintiff to recover by way of punitive or exemplary damages in case of injury, by way of example or punishment to the defendant. That is the universal common-law rule. You have eliminated absolutely the common-law rule. I do not know whether your attorneys have advised you as to that rule or not, but, whether they have or not, it is the law; so you have eliminated the common-law rule.

Mr. DAVENPORT. That is, so far as the rule of damages is concerned?

The CHAIRMAN. Yes.

Mr. DAVENPORT. But I wanted to call Mr. Low's attention to the fact that there is a most remarkable contradiction in this bill.

The CHAIRMAN. That is your proposition.

Mr. DAVENPORT. That is Mr. Low's proposition.

Mr. Low. Mr. Davenport—

Mr. DAVENPORT. Excuse me. I do not want to take up your time and get into a controversy. I can be heard later.



Mr. Low. Mr. Davenport has raised a point the significance of which I can properly say I had not quite appreciated. I had not realized that for the purpose of private interference action might come under the Sherman law, while for the purpose of public interference they were under a modified law. That is a point that I certainly had not thought of. I do not know whether the lawyers did or not. It was not a matter of discussion.

Mr. DAVENPORT. I will ask if this is the first draft of the bill, or is it the last of many drafts?

Mr. Low. It is the last of many drafts.

Mr. DAVENPORT. Was not that point before the Civic Federation?

Mr. Low. No; I do not think that point, in the form in which you presented it, was considered.

Mr. DAVENPORT. Who drew those provisions of the law, if it is not—

Mr. Low. I do not think that has anything to do with it, Mr. Chairman.

Mr. DAVENPORT. I do not want to press it.

Mr. Low. What I mean to point out is that the effort was not made to interfere with the rights of private parties, except as to cutting down the damages from threefold to single.

Mr. DAVENPORT. I would like to ask another question.

The CHAIRMAN. I do not understand that Mr. Low is a professional man; that is, you are not a member of the legal profession?

Mr. Low. No.

The CHAIRMAN. If I do not assume too much, I do not understand that you undertake to speak with authority upon the legal phases of the proposition at all?

Mr. Low. No; I do not.

The CHAIRMAN. But that your suggestions are intended to cover what you think the general propositions involved in the law are, and to suggest a remedy, in your judgment?

Mr. Low. That is it exactly.

Mr. DAVENPORT. I want to call the attention of Mr. Low to the fact that a bill on this general subject was introduced in the Senate by Senator Warner, being Senate bill 6440. Was that introduced at the request and under the auspices of the Civic Federation?

Mr. Low. No, sir.

Mr. DAVENPORT. Not at all?

Mr. Low. No, sir.

Mr. DAVENPORT. I notice a very important modification in the bill. Do you consider that this provision in regard to combinations between laborers and employers, and between employers and laborers, is merely tentative, or is it the result of the mature reflection and judgment of the proponents of the bill?

Mr. Low. I think I have said on that subject all that I can say, in my statement, Mr. Chairman.

Mr. DAVENPORT. Very well. I will not interrupt any further.

The CHAIRMAN. Gentlemen, whom shall we have next?

Mr. EMERY. May I be permitted to ask one question?

The CHAIRMAN. Certainly.

Mr. EMERY. The chairman suggested some time ago that he was looking up a standard by which to measure the reasonableness or un-

reasonableness of a particular combination. Mr. Low has explained that, in the proposed bill, while an appeal to the court is given as a right over the cancellation of registration, that no appeal is given over the administrative decision as to the reasonableness or unreasonableness of a combination offered to the Commissioner of Corporations for his opinion. As Mr. Low has said the bill is the result of numerous conferences, could he, before he sits down, throw any light upon what would be the administrative standard of measuring the reasonableness or unreasonableness of any particular combination, and would it be other than any judicial standard of which he has any knowledge?

Mr. Low. Mr. Chairman, I once knew a young man who asked his father what there was before there was anything, and what it looked like; which illustrates that it is a great deal easier to ask some questions than to answer them. I have already stated in my paper that I do not know of any way in which to get an appeal from an administrative decision of that character. That is one of the features of the bill which must be considered. It offers a great deal of room for difference of opinion, I know.

The CHAIRMAN. I did not quite hear the question.

Mr. EMERY. He has misapprehended me if he thought I made objection with regard to the lack of means of appeal. I want to ask this: Inasmuch as this matter of passing upon the reasonableness or unreasonableness of the combinations is left in the bill to administrative officers—assuming that that was the law—as a result of his conferences with administrative officers of the Government, has any suggestion been made, or can Mr. Low give us any idea as to what would be considered as a standard by the administrative official for measuring the reasonableness or unreasonableness of particular combinations?

The CHAIRMAN. He has already answered by saying that he did not know. He not only said that he did not know, but that he did not know anybody that did know, which I think covers the whole ground.

Mr. Low. May I file, as part of the record, a summary of the bill? This deals with it section by section.

The CHAIRMAN. It is practically a résumé of the statement already made?

Mr. Low. Yes, sir.

The CHAIRMAN. Of course. Any gentleman can file anything he likes at any time if at the time of filing he calls the attention of the committee to the substance of the paper filed, so that if there is anything in it that is new we can have an opportunity to look at it.

The summary of the bill above referred to is as follows:

In October, 1907, a conference was held at Chicago on the subject of trusts and combinations, under the auspices of the National Civic Federation. This conference was attended by delegates appointed by the governor of almost every State in the Union and by many important commercial, agricultural, and labor organizations. At this conference certain resolutions on the subject of trusts were adopted, and a committee was appointed to present the resolutions to the President and Congress. The subcommittee charged with this duty brought about the presentation of these resolutions to both Houses of Congress in February by the courtesy of the chairman of the Committee on Interstate Commerce, Senator Elkins, in the Senate, and of Colonel Hepburn, chairman of the Committee on Interstate and Foreign Commerce, in the House. At the time when these resolutions were presented both of these gentlemen asked the subcommittee

to prepare a bill embodying the views of those whom they represented. The bill so prepared is entitled: "An act to regulate commerce among the several States or with foreign nations, and to amend the act approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.'" The act which it is proposed to amend is popularly known as the Sherman antitrust law. The bill has been prepared under the auspices of the National Civic Federation, in consultation, on the one hand, with the President and other Executive officers of the Government, and on the other hand, with representatives of the business and railroad interests of the country and of organized labor. The effort has been to prepare a bill which in its general scheme would command the support of the President, and which would deal with all interests affected by the Sherman antitrust law fairly, and, so far as conditions would permit, in the same way. A summary of the measure thus prepared follows herewith.

#### SUMMARY OF THE BILL.

1. The Sherman antitrust law forbids all contracts or combinations or conspiracies in restraint of trade, and any monopolizing of or attempt to monopolize trade. The first six sections of the act deal with the powers of the Government in relation thereto. The seventh and last section of the act gives private parties a right to sue and to collect threefold damages.

2. The United States Supreme Court, by a long series of decisions, has held that this law applies to common carriers, to business corporations, and to business men, and also to labor organizations and to labor men. The Supreme Court has also decided that any action in restraint of trade, so far as it applies to interstate commerce, is unlawful, whether such action be reasonable or not.

3. The bill submitted by the National Civic Federation does not attempt to change the legal status of anything condemned as in restraint of trade under the Sherman antitrust act; but it aims to provide a way by which, under certain conditions, combinations, and contracts in restraint of trade that are not unreasonable may be saved from attack. The benefits and immunities offered by the proposed bill, therefore, will be in the main confined to those who register in accordance with the terms of the bill. Common carriers may register with the Interstate Commerce Commission and all others with the Commissioner of Corporations in the Department of Commerce and Labor. It is proposed to amend section 7 of the Sherman antitrust act by cutting out the provision for threefold damages, reducing the amount that can be collected to simple damages, as under the common law. Everybody, whether registered or not, will get the benefit of this provision.

4. Both corporations for profit and having capital stock and also corporations not for profit and not having capital stock may register, but neither are obliged to do so. This description is intended to include cooperative organizations as well as business corporations, agricultural and labor organizations, and the like. If they do register, they get the benefits of the act. If they do not register, they remain under the Sherman antitrust law unamended. In order to register corporations for profit and having capital stock are obliged to give such information in regard to their financial condition, their contracts, and their corporate proceedings as may be prescribed by general regulations from time to time to be made by the President of the United States. Corporations not for profit and not having capital stock in order to register must set forth their charter or agreements of association and by-laws, the place of their principal office, and the names of their directors or managing officers, and standing committees, if any, with their residences. Any corporation or association that is registered may be stricken from the registry if it shall fail at any time to file the statements or to give the information required under this act, or to comply with the requirements of this act, or in case information furnished by it shall be false in any material particular. Anyone feeling aggrieved by the decision to remove it from registry has an appeal to the courts.

5. Being upon the registry, the corporation, or association, or individual gets certain immunities as to the past and the benefit of provisions by which it can ascertain as to future contracts, whether these will or will not be attacked by the Government as in unreasonable restraint of trade. As to future combinations or contracts, the Government is given thirty days in which to disapprove any contract or agreement filed by a corporation or association registered under the act; and if within thirty days the Government does not disapprove the contract, the Government can not thereafter attack it except through the courts, and

then only on the ground that it is in unreasonable restraint of trade. Contracts or agreements calling for new business combinations must be filed. Contracts or agreements entered into in the ordinary course of business may be filed or not at pleasure. Such contracts, if not filed, do not get the benefit of the immunities of the new act, but nobody is obliged to file such a contract unless he wants to do so.

6. As to the past, it is proposed that all pending actions may be prosecuted and defended to final effect, precisely as though the Sherman antitrust law had not been amended; but that no new proceedings shall be begun under the Sherman antitrust law on account of any contract, agreement, or combination made prior to the passage of the amending act, unless the same be in unreasonable restraint of trade; and no suit at all shall be begun by the United States as to registered corporations or associations under the Sherman antitrust law after one year from the passage of the amending act.

7. In view of the doubt that has been raised in the minds of many as to whether the Sherman antitrust act does not make even a strike unlawful, a clause is included in the bill distinctly reserving for labor all rights that they have now, irrespective of the Sherman antitrust act, to combine and to strike and to make trade agreements; and reserving for employers of labor the correlative rights to combine and to discharge their employees.

8. The foregoing summary of the bill is a layman's summary, which does not attempt to use legal terms with legal exactness. It is believed, however, that with this explanation of the scheme of the bill, the provisions of the bill itself will be more readily understood.

SETH LOW,

*President of The National Civic Federation.*

NEW YORK, March 21, 1908.

Mr. PARKER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Yes.

Mr. PARKER. Mr. Low, you mentioned the Ellis-Chalmers case. Will that be in the record?

Mr. Low. Yes; I gave the list that I had with me to the stenographer.

The CHAIRMAN. Mr. Morawetz is here, and he is perfectly able to present every phase of the question. When we come to the legal question, we can inquire of Mr. Morawetz as to those matters. Some member of the committee suggested that it is now the hour of 12 o'clock. I will consult the convenience of Mr. Low. Would it be convenient to suspend now until half past 1?

Mr. Low. Yes.

The CHAIRMAN. Would that be agreeable all round; to come back at 1.30 and go on?

Mr. MALBY. Let us go on a few minutes longer.

Mr. Low. I would suggest that Mr. Schieffelin take up the point that he proposed to answer, if you have no objection.

The CHAIRMAN. Very well.

**STATEMENT OF WILLIAM JAY SCHIEFFELIN, ESQ., PRESIDENT OF SCHIEFFELIN & COMPANY, NEW YORK.**

The CHAIRMAN. Please state your full name.

Mr. SCHIEFFELIN. William Jay Schieffelin, president of Schieffelin & Company, wholesale druggists, New York.

Mr. ALEXANDER. Is there not a firm of your name in Washington?

Mr. SCHIEFFELIN. We have an agency here.

The CHAIRMAN. You may proceed.

Mr. SCHIEFFELIN. I am also chairman of the committee on proprietary goods of the National Wholesale Druggists' Association,

which includes nearly every wholesale druggist in the United States. In 1804 the house of which I am president (and which, I may say, has been conducted as a wholesale drug business uninterruptedly almost since the beginning of our nation—it started in 1794) issued a price list, and indorsed across that price list were the words, "Examined and approved by the Apothecary Society of New York." I only cite this to show that at that time it was the custom in the trade, as it is to-day, and has to be, that there shall be certain reasonable agreements regarding prices. Some thirty years ago the increase in the number and the demand for what are called "patent medicines"—but what are proprietary medicines, whether secret or non-secret—became so great that they constituted nearly 60 per cent of the drug business. These goods were made of uniform quality by their makers and were given trade names. I need not go into the reason for the necessity for it at that time—our large and growing frontier, the absence of doctors, and the need of having household remedies in the country stores that sold everything. The fact that these goods were put out at fixed prices—

The CHAIRMAN. Do you mean uniform quality or uniform prices?

Mr. SCHIEFFELIN. Uniform quality, as far as the name of the particular medicine went. They were all with the same label, in the same bottle, and from the same maker. The public would ask for a certain thing, and if it could buy the same thing of one man at 60 cents a bottle and had to pay 75 cents a bottle to get it from another man, the man who sold it at 60 cents a bottle had the advantage. It led to tremendous price cutting.

The CHAIRMAN. That was really uniform advertising.

Mr. SCHIEFFELIN. It would have been if they all asked the same price.

The CHAIRMAN. They advertised uniform quality, and perhaps got different prices for it?

Mr. SCHIEFFELIN. Yes. However, the wholesalers at that time found that at least 50 per cent of their business was being done by cutting, cutting, cutting, in order to keep their customers. So they asked the manufacturers to make fixed prices for these goods. And the retailers found shortly after that that great department stores were being started in the cities, and these great department stores would buy large quantities of the leading patent medicines and sell them at prices less than cost in order to attract the public there and sell them other goods at a profit. Mr. Ogden, who was the head of the Wanamaker store in New York, since retired, told me that the profit they made was on goods that they sold to people who bought what they did not intend to buy when they visited the store. In other words, they came to buy the leader, and they would see other things and buy them.

The retail druggists formed a National Association of Retail Druggists, which has probably a membership of 22,000. I say "probably." They claim that.

The CHAIRMAN. What proportion of all the druggists did that include?

Mr. SCHIEFFELIN. Over half. But the same thing applied to the other druggists. That did not mean that the others were cutters. The cutters were in much smaller proportion, and the damaging

cutters were the great department stores. The retailers said to the wholesalers: "Will you not make an arrangement with us and with the manufacturers, so that these goods can not be supplied if they are going to be sold at cut rates?"

Now, if this sort of combination had resulted in raising the prices to the public over what the manufacturer placed on the bottle—25 cents, 50 cents, or \$1—it might have been called an unreasonable restraint of trade. The manufacturer went on and put the goods on the market, simply putting a price on that he thought would afford a fair profit to the retailer and to the wholesaler.

The CHAIRMAN. Yes; but what about the customers of the department stores?

Mr. SCHIEFFELIN. I am coming to that.

The CHAIRMAN. That is, as to the reasonable price.

Mr. SCHIEFFELIN. Regarding the reasonableness of it?

The CHAIRMAN. Yes; the price they get it for.

Mr. SCHIEFFELIN. Exactly. If these goods were in the line of absolute necessities of life, I might concede that point; but when a year and a half ago the Department of Justice of our Government was prosecuting the whole drug trade for this sort of agreement the Departments of Agriculture and of Commerce and Labor and of the Treasury were prosecuting the whole trade on the other side, on the plea that these very goods were bad for the public anyhow and ought not to be used. [Laughter.]

The CHAIRMAN. So that you get it going and coming?

Mr. SCHIEFFELIN. Both ways.

The CHAIRMAN. Now we are beginning to find out who has been violating this unfortunate legislation. [Laughter.]

Mr. SCHIEFFELIN. Precisely. The wholesalers said: "We only ask a reasonable profit, that will net us, say, between 2 and 3 per cent." I think anybody who is impartial will say that is perfectly fair. They made this agreement with the manufacturers and with the retailers, and it worked so well that in certain places the retailers became sensible of their power, and they said: "Now, there are several aggressive cutters here. Let us make the wholesalers refuse to sell them anything; not only these patent medicines, but unless they maintain the prices, let us refuse to send them sponges and chamois, drugs and chemicals, and everything. In New York, fortunately, whether by reason of our courage or by reason of the lack of unanimity among the retailers, the wholesalers stood out against it. They said: "We will not stand for any such policy." In certain other places, notably Philadelphia, they surrendered; and that made an action that seemed to be tyrannous, and the Sherman law was appealed to. In the case of that unfortunate concession in Philadelphia the whole drug trade has been enjoined from making any three-party agreement—any agreement that is between the manufacturer on the one hand, and the distributor (the jobber) in the middle, and the retailer on the other hand.

The CHAIRMAN. Was the Philadelphia scheme, in your judgment, a proper scheme?

Mr. SCHIEFFELIN. Absolutely improper.

The CHAIRMAN. Absolutely improper?

Mr. SCHIEFFELIN. Yes.

The CHAIRMAN. So that the origin of the litigation against this combination was perfectly justifiable?

Mr. SCHIEFFELIN. It was, locally. The result of it is the injunction whose terms are so sweeping. We would have been perfectly satisfied if any sort of an arrangement involving a boycott, involving a black list, and refusing everything, was enjoined; but the United States court has enjoined us from making any kind of an agreement and from using any kind of persuasion.

The CHAIRMAN. The agreement that you want to make would practically eliminate the department store, would it not?

Mr. SCHIEFFELIN. Not a bit. They can buy on the same terms.

The CHAIRMAN. But it would eliminate them so far as selling at low prices is concerned, would it not?

Mr. SCHIEFFELIN. Of course it would.

The CHAIRMAN. You now have a scheme that is going to deprive the department store of doing what it wants to do.

Mr. SCHIEFFELIN. Yes.

The CHAIRMAN. And it wants to sell goods of that character at a price very much less than the other people sell them for?

Mr. SCHIEFFELIN. Yes.

The CHAIRMAN. Your proposition, now, is to keep up the combination and compel the department stores to sell for the prices that other people propose to sell for?

Mr. SCHIEFFELIN. So far as these goods are concerned.

The CHAIRMAN. Does that look reasonable, so far as the department store and its customers are concerned?

Mr. BANNON. Where does the consumer come in?

The CHAIRMAN. I say the consumer. Does that look reasonable, so far as concerns the department store and its customers, or consumers?

Mr. SCHIEFFELIN. We think it is reasonable to provide that no one shall sell the goods below cost.

The CHAIRMAN. What does a bottle of sarsaparilla, that you retail for \$1, cost? It costs 15 or 20 cents, does it not?

Mr. SCHIEFFELIN. It costs the jobber just 10 and 5 per cent.

The CHAIRMAN. What does it cost the manufacturer? You know all about it.

Mr. SCHIEFFELIN. No; I do not know anything about it.

The CHAIRMAN. It does not cost over 15 or 20 cents, does it?

Mr. SCHIEFFELIN. We do not make those secret goods.

The CHAIRMAN. Well, you are a pretty bright man. Do you not know, as a matter of fact, that the ordinary bottle of sarsaparilla does not cost over 15 or 20 cents?

Mr. SCHIEFFELIN. I know that the average maker of sarsaparilla is in a very bad way to-day on account of the ever-increasing cost of advertising.

The CHAIRMAN. Does that answer the question?

Mr. SCHIEFFELIN. Yes; because the cost must include the cost of introduction—advertising the goods.

The CHAIRMAN. But you know that the cost of the material is not over 15 or 20 cents a bottle?

Mr. SCHIEFFELIN. I do not doubt it.

The CHAIRMAN. So that there is a margin between 15 or 20 cents a bottle and 100 cents for advertising, wholesalers' profit, and retailers' profit?

Mr. SCHIEFFELIN. Yes.

The CHAIRMAN. Your proposition, now, is that you want to be authorized to keep up a union that will compel the public to pay \$1 a bottle?

Mr. SCHIEFFELIN. For that particular thing.

The CHAIRMAN. Or any other thing that they are interested in.

Mr. BANNON. Take listerine. That is not advertised at all.

The CHAIRMAN. Well, take that.

Mr. SCHIEFFELIN. That is advertised enormously.

Mr. BANNON. Listerine is?

Mr. SCHIEFFELIN. Yes.

The CHAIRMAN. Your proposition is that you want legislation to prevent the department store from selling to its customers and consumers at prices less than you want your retailers to sell for?

Mr. SCHIEFFELIN. That is one of the simple propositions.

The CHAIRMAN. That is what you want us to authorize you to do?

Mr. SCHIEFFELIN. Certainly.

The CHAIRMAN. I suppose that it may be inferred the department stores object to that?

Mr. SCHIEFFELIN. I should not wonder.

The CHAIRMAN. And that its customers would object?

Mr. SCHIEFFELIN. I do not think they care.

The CHAIRMAN. It does not make any difference to them whether they pay 75 cents or \$1 a bottle, I suppose?

Mr. SCHIEFFELIN. The difference usually is not as much as that.

The CHAIRMAN. Well, 80 cents a bottle, or 79 cents. I guess that is about where they put it. [Laughter.] That is what it really comes down to, is it not?

Mr. SCHIEFFELIN. Yes; it comes down to that; but if we want to—

The CHAIRMAN. I suppose that if there were more department stores and they were situated in more places than there were retail drug stores and they sold more goods, the balance of the reason would be in favor of the department store and its customers, would it not?

Mr. SCHIEFFELIN. If they are a majority, it would.

The CHAIRMAN. But inasmuch as they are in the minority, the majority ought to be allowed to compel them to do business just as the majority wants to have it done?

Mr. SCHIEFFELIN. That is the way it is always done in business.

The CHAIRMAN. That is what it comes down to.

Mr. SCHIEFFELIN. I wanted to say that this litigation was put in the newspapers as proceedings against the "drug trust." Nothing could be more incorrect than to term it a trust—the drug trust. This Sherman law was enacted really to aid the many against the few, against the great big aggregations. In our particular case it has aided the few against the many, and practically against all. It has been said that you can not indict a whole nation, but here the United States court has enjoined an entire trade, 500 or 600 wholesalers and 4,200 retailers. We are all covered. And in the English—



The CHAIRMAN. How many retailers are there that are not covered?

Mr. SCHIEFFELIN. They are all covered.

The CHAIRMAN. All the retailers?

Mr. SCHIEFFELIN. Practically all.

The CHAIRMAN. I thought there were only about half of them in your association in the country.

Mr. SCHIEFFELIN. But by the terms of the injunction it did not cover only members of the association. It applied to anyone who signed these three party contracts. That included all the other retailers, too.

The CHAIRMAN. Does that include all the other retailers throughout the country?

Mr. SCHIEFFELIN. Practically all. Last summer it seemed to be of interest to learn what was the custom in the great commercial nations regarding this sort of thing. I wrote to Secretary Root, submitting in a letter a series of questions, and he very kindly sent them to our consuls and consuls-general in England, France, and in Germany, and their replies show that there are no restrictions against agreements such as I have outlined to you here to-day, and our association has had these replies printed and submitted to Members of Congress. We would be very glad—

Mr. ALEXANDER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Yes.

Mr. ALEXANDER. What provision in this bill will help you out? Will you read the language?

Mr. SCHIEFFELIN. I am coming to that.

Mr. PARKER. May I ask a question, Mr. Chairman?

The CHAIRMAN. Certainly.

Mr. PARKER. You have spoken of the tripartite agreement. Have you a copy of that here?

Mr. SCHIEFFELIN. They were different in nearly every case.

Mr. PARKER. Have you a specimen of one of them?

Mr. SCHIEFFELIN. I have not, here.

Mr. PARKER. They are not very long, are they?

Mr. SCHIEFFELIN. They are not very long; no.

Mr. PARKER. I would like to see one, if you will put one into your evidence. It will show what the usual terms are.

Mr. SCHIEFFELIN. There are present to-day a number of members of our association. We have present Mr. Frank Faxon, of Faxon & Gallagher, Kansas City; Mr. Albert Plaut, of Lehn & Fink, New York, and Mr. William Kuebler, of Roeber & Kuebler, Newark, N. J. I have no doubt they can give you an outline of the form of the usual tripartite agreement. I will send it in.

Mr. DAVENPORT. May I ask a question, Mr. Chairman?

The CHAIRMAN. I want to ask one more question about the litigation. In what stage is it? Has the decree been made permanent?

Mr. SCHIEFFELIN. Yes.

The CHAIRMAN. So that the legal question is closed?

Mr. SCHIEFFELIN. No.

The CHAIRMAN. Have you appealed from the decree?

Mr. SCHIEFFELIN. No, sir; but we are going to this morning.  
[Laughter.]

The CHAIRMAN. I do not understand that you enter an appeal here in the committee to any decree where the case is pending. So that up to date we are passing on a hypothetical legal proposition that is now on test in the courts.

Mr. SCHIEFFELIN. The decree is already agreed to, and is permanent.

The CHAIRMAN. Then you do not appeal from it this morning?

Mr. SCHIEFFELIN. In the amendment we are going to present you will see how it modifies the decree. Just add to the bill, "but no such judgment or decree"—

The CHAIRMAN. Excuse me. I want to get at the litigation itself. Is that litigation decided now?

Mr. SCHIEFFELIN. Yes.

The CHAIRMAN. So the decree is made and your association has taken no appeal therefrom?

Mr. SCHIEFFELIN. We agreed to the decree.

The CHAIRMAN. That settles that part. Now, you have a suggestion that will relieve you of the embarrassment of the decree, as I understand, and that you propose to read?

Mr. SCHIEFFELIN. Yes; the last clause of the proposed law says—

Mr. ALEXANDER. What page is that?

Mr. SCHIEFFELIN. Page 9 of the bill there—the proposed amendment.

The CHAIRMAN. Page 9?

Mr. SCHIEFFELIN. Yes; it reads:

Anything herein contained to the contrary notwithstanding, all actions and proceedings now or heretofore pending under or by virtue of any provision of the said act approved July second, eighteen hundred and ninety, may be prosecuted and may be defended to final effect;—

And here is the part that affects us—

and all judgments and decrees heretofore or hereafter made in any such actions or proceedings may be enforced in the same manner as though this act had not been passed.

Now, the retail druggists publish an organ called the "National Association of Retail Druggists' Notes"—

The CHAIRMAN. Will you read that part of the bill again?

Mr. SCHIEFFELIN. The proposed amendment says:

And all judgments and decrees heretofore or hereafter made in any such actions or proceedings may be enforced in the same manner as though this act had not been passed.

It says so in terms.

The CHAIRMAN. And you propose an amendment to that?

Mr. SCHIEFFELIN. Yes. But first I want to say that 22,000 of the retail druggists say that—

In other words, the mere fact that we are the victims of an unjust law, which it is now proposed to change because of its injustice, this fact alone is to bar us forever from receiving the protection of the amended law.

Our counsel have written me a letter suggesting the following sentence to be added to it, and I will say in passing that the Govern-

ment has during the past few months twice deprived us of counsel by taking first Mr. Hough and Mr. Ward and appointing them judges.

The CHAIRMAN. Those associations are entitled to great credit for their acumen in retaining good men.

Mr. SCHIEFFELIN. Yes. This is from Robinson, Biddle & Ward, now Robinson, Biddle & Benedict. They suggest that it would be desirable to add:

But no such judgment or decree shall be held to prevent any person whatsoever from taking advantage of the benefits and immunities of this act in reference to any contracts or combinations hereafter made.

We ask that that may be added to the bill. I will be very glad now to answer any questions if any are to be asked.

The CHAIRMAN. There can not be any question but what if there is any bill it ought to apply to all equally.

Mr. TIRRELL. Do you believe any law ought to be passed by the Congress of the United States that would prevent any corporation or any individual, if they saw fit, from selling an article for a less price than they paid for it?

Mr. SCHIEFFELIN. The law does not do that. The law simply prevents anybody from taking any action. The law we object to prevents anybody from taking any action that may make it difficult for any particular corporation to get the goods.

The CHAIRMAN. And you want to correct that?

Mr. SCHIEFFELIN. Yes. We think it is a great menace to our trade. We think the little retailer has a right to live.

Mr. TIRRELL. Do you think if Congress should approve that in a legislative act that that indirectly would accomplish the result?

Mr. SCHIEFFELIN. Congress ought to modify an act that never was intended to interfere with a business custom which has existed from time immemorial.

Mr. TIRRELL. And you think the Government should pass a law which would enable you to prevent a department store from selling the articles manufactured by your association at less than cost, if they saw fit to do so?

Mr. SCHIEFFELIN. If they can get them they can sell them. They could buy them and sell them of course. There is always some way.

The CHAIRMAN. But if your people control the whole wholesale trade they have got to come to you. They could not get it very well without coming to you.

Mr. SCHIEFFELIN. They can sell somebody else's if they want to. It is not a fair way for them to compete. We can not stand for that way of doing business.

Mr. PARKER. May I ask a question?

The CHAIRMAN. Certainly.

Mr. PARKER. The apothecaries, the retailers, are all educated men and pharmacists?

Mr. SCHIEFFELIN. Yes, sir.

Mr. PARKER. And when they give a patent medicine of that sort to a man to use they give it with some knowledge of what effect the medicine will have and what it will do?

Mr. SCHIEFFELIN. Not altogether. Some of the things do not state what they contain.

Mr. PARKER. But they know what they are used for, at any rate?

Mr. SCHIEFFELIN. I know of a case where a man sold a thing that was labeled "Preventative of coughs and colds." The man who bought it came back a little later and said "that did not prevent or cure my cough." The druggist said, "what did you do with it?" The man said, "I took it." The druggist said, "of course it did not, if you took it. It is an application to be put on the soles of your shoes." [Laughter.] That is all the average druggist knows about patent medicines.

Mr. PARKER. Are you talking about the retail druggists or the retail department stores?

Mr. SCHIEFFELIN. The retail department stores have to employ druggists to do their selling.

The CHAIRMAN. I do not suppose it requires a very high degree of intelligence to transfer a bottle of patent medicine for cash, does it?

Mr. SCHIEFFELIN. Not a bit.

Mr. PARKER. The department stores employ druggists?

Mr. SCHIEFFELIN. Yes.

Mr. PARKER. Are not patent medicines sold in little groceries, and all that sort of thing?

Mr. SCHIEFFELIN. Yes.

Mr. PARKER. And there are no druggists there?

Mr. SCHIEFFELIN. But the department stores that sell them nearly always have a prescription department, too.

Mr. DAVENPORT. May I ask a question?

The CHAIRMAN. Yes.

Mr. DAVENPORT. In what court was that judgment rendered?

Mr. SCHIEFFELIN. At Indianapolis, Ind., the United States circuit court.

Mr. DAVENPORT. Have you a copy of the complaint?

Mr. SCHIEFFELIN. I have not, here, but it is all in the annual report.

Mr. DAVENPORT. The complaint, the answer, and the evidence? Is that accessible to the committee?

The CHAIRMAN. What is the question?

Mr. DAVENPORT. Whether in the case in which they were enjoined, he has a copy of the complaint and of the answer and of the evidence, which may be furnished to the committee or to the gentlemen—

The CHAIRMAN. I rather infer that Mr. Schieffelin's attorney is here.

Mr. SCHIEFFELIN. No.

The CHAIRMAN. You can furnish us with that, can't you?

Mr. SCHIEFFELIN. I think we can furnish you with an abstract. I do not think we can give you the entire record.

The CHAIRMAN. That would cover the whole ground. If it is an abstract made by counsel, they have probably left out the useless matter. Would you be kind enough to state, if you know, how many department stores there are in the country?

Mr. SCHIEFFELIN. I do not know. I think there are over a dozen in our city.

The CHAIRMAN. In New York?

Mr. SCHIEFFELIN. Yes, sir.

A BYSTANDER. Two dozen.

Mr. SCHIEFFELIN. Two dozen.

The CHAIRMAN. Do you get them all around in the large towns throughout the country?

Mr. SCHIEFFELIN. I think so—in every city of the first class.

The CHAIRMAN. So the department store business which furnishes the embarrassment of which you have been speaking, and which is obvious enough, is generally diffused, and affects a large percentage of the people who have occasion to buy the materials in which they deal. I suppose that would be true?

Mr. SCHIEFFELIN. Yes; that is very true; but this kind of an act on our part is not going to menace the department stores.

The CHAIRMAN. Is it not true that the department store probably caters to as large a clientage as the retail drug trade itself?

Mr. SCHIEFFELIN. Oh, no.

The CHAIRMAN. I do not know, in that respect.

Mr. SCHIEFFELIN. Not as far as drugs are concerned.

Mr. Low. May I ask a question?

The CHAIRMAN. Yes.

Mr. Low. Is not the case parallel to that of the Standard Oil Company, selling in one part of the country at a loss by reason of the profit they make elsewhere? It seems to me while the thing is different in form, it is of the same character. The retail druggists find it almost impossible to live because of this competition of the department store, making a selling feature of drugs, and carrying the loss by the profits they make on other articles.

The CHAIRMAN. Whether the Standard Oil Company indulge in the interesting process of which you speak, I am not advised. Whether they are deliberately destroying competition by selling at a less price until they wipe out competition, and then raising the price, I do not know about; but if they are, they are not on a parallel to the department stores, because they are not under one head, and operated from one source.

Mr. Low. But the nature of the conflict is the same. They are trying to freeze out the little man.

The CHAIRMAN. The nature of any conflict involving competition is the same.

Mr. SCHIEFFELIN. I want to point out that the drug trade is almost the only trade that is doing business now under threat from the Government. If there is any immunity we want to be included in that immunity.

The CHAIRMAN. So far as we have been advised up to the present, the drug trade is the only trade the Department of Justice has succeeded in discovering engaged in the process of violating the antitrust law, although thousands and thousands of other people may be engaged in the same interesting process. But you are the only people up to date, so far as we know, who have been discovered. Is that right?

Mr. SCHIEFFELIN. We do not think that what we had been doing was in violation even of that law. We think that that particular local incident was in violation. We do think the injunction having been made so sweeping as to cover all these tripartite agreements is unfair.

The CHAIRMAN. But your counsel agreed to that, as I understand it.

Mr. TIRRELL. If that particular case is clear to your mind, why do you not have a test case made in New York, say, which would go

into the general definition that you have given us about these things, so as to determine whether you are violating the law?

Mr. SCHIEFFELIN. The injunction includes everything, and we have had to agree to that.

Mr. ALEXANDER. May I ask one question?

The CHAIRMAN. Certainly.

Mr. ALEXANDER. Do I understand you to stand for this bill in all its features, or are you here simply asking that your amendments be included provided the bill shall become a law?

Mr. SCHIEFFELIN. The unanimous vote of the wholesale druggists assembled in convention last fall, in December, was that Congress should be asked to amend the Sherman Act in such way that it would only prevent unreasonable trade agreements. We appointed a committee to attend the National Civic Federation Congress in Chicago, and there a further step was taken by the congress in adopting a declaration including several further modifications. Personally I can not speak for our entire organization regarding every part and every point in this bill; but as a general thing I am sure, and you can ask the other members who are present, we approve the general tenor of the bill, provided it does not legalize a boycott. We think that the bill as introduced in the Senate, with a little clearer definition of that labor clause, is better to that extent.

Mr. GOMPERS. Do you not think you ought to allow us to speak for our side?

Mr. SCHIEFFELIN. We were asked to give our opinion on the whole bill.

Mr. GOMPERS. But why point out a special feature of it?

Mr. SCHIEFFELIN. I have to point out a feature, because it is involved in it. Otherwise I think the bill is a good one to try.

Mr. ALEXANDER. As I understand then, your association, as an association, has not passed upon this bill which is now before us, under consideration, H. R. 19745?

Mr. SCHIEFFELIN. That is true. It has not.

Mr. ALEXANDER. Do you not think you ought to do so?

Mr. SCHIEFFELIN. Yes.

Mr. ALEXANDER. Do you not think you ought to do so inasmuch as you come as the president of the association?

Mr. SCHIEFFELIN. I am not the president. I am the chairman of the committee on proprietary goods.

The CHAIRMAN. I do not understand that Mr. Schieffelin undertakes to make himself responsible for the details of the bill. Here is a bill pending which proposes to make some fundamental changes in the law. Mr. Schieffelin's proposition is that under the law as it stands there is a perpetual injunction against them, and that if the law is changed it would turn out that this injunction is based upon conditions that the law as changed would not apply to, and he thinks that in the change they ought to be put on a level with the others, and relieved from the injunction.

Mr. SCHIEFFELIN. We would like to have it changed.

Mr. ALEXANDER. My question does not touch that matter at all.

The CHAIRMAN. I beg your pardon. I was not noticing.

Mr. ALEXANDER. No; you were not hearing.

Mr. SCHIEFFELIN. We would like to have the law changed.

The CHAIRMAN. You do not undertake to approve of all the details of the bill?

Mr. SCHIEFFELIN. Not all.

The CHAIRMAN. But generally you would like the law changed in that particular?

Mr. SCHIEFFELIN. Yes.

Mr. ALEXANDER. As a matter of fact the association you represent has not studied the features of this bill, and you are not prepared now to say whether you approve of them or not?

Mr. SCHIEFFELIN. The association has studied the bill in the way any association studies a bill. Its committee on legislation has had the bill under consideration. It has had an opinion from three of its counsel regarding the bill, and the chairman of its committee on legislation has asked Mr. Faxon, Mr. Plant, and Mr. Kuebler to attend here and represent the association in advocacy of the bill. That does not mean every line of the bill is just as we would have it. But we have considered the bill as a whole.

The CHAIRMAN. That means that if you can get relief, so as to do the things you have described here, that is what you would like to have?

Mr. SCHIEFFELIN. Yes.

The CHAIRMAN. That in substance is the interest you have in it?

Mr. SCHIEFFELIN. Yes; and as far as we are concerned, we think it would be good for the entire country.

The CHAIRMAN. You think that other people are situated as you are situated?

Mr. SCHIEFFELIN. We know from Chicago men and other men, representing all kinds of business, that they regard this act as an incubus—this threat—not knowing how far they can make contracts.

The CHAIRMAN. If you turn it over to somebody else to say what is reasonable, with the knowledge that he does not know what is reasonable, would that add to the enlightenment, or would it contribute to the confusion?

Mr. SCHIEFFELIN. Well, we would have taken a step further.

The CHAIRMAN. That is, there would be less confusion, you think, if we imported into it an element that nobody knows anything about, and nobody can tell in advance anything about?

Mr. SCHIEFFELIN. We would know that anything we did within reason would be reasonable.

The CHAIRMAN. But you would not know in advance whether anybody was going to say it was in reason. You would not know whether Herbert Knox Smith would say it was reasonable or not.

Mr. SCHIEFFELIN. Eventually the courts would pass on it.

The CHAIRMAN. You would not know upon what hypothesis he was going to act.

Mr. ALEXANDER. Mr. Schieffelin, you were about to remark, when you were interrupted by Mr. Littlefield, something about legalizing a boycott. What were you going to say on that question?

Mr. SCHIEFFELIN. I meant to say that we would not approve of a bill which would legalize a boycott.

The CHAIRMAN. Or a blacklist?

Mr. SCHIEFFELIN. Or a blacklist.

The CHAIRMAN. There is no reason why a blacklist should be allowed when the boycott is prohibited.

Mr. ALEXANDER. Have you carefully considered the part of this bill in respect to that?

Mr. SCHIEFFELIN. I have read it twenty times, I think.

Mr. ALEXANDER. What is your opinion? Does it legalize a boycott and blacklist, or otherwise?

Mr. SCHIEFFELIN. I do not think it does, because the same thing applies in giving liberty to the employers as applies in giving liberty to the employed; but I do think that while it can be interpreted by anybody ignorant of the law as legalizing it, it ought to be stated in terms that it does not legalize it.

The CHAIRMAN. You would be willing to have put in section 3:

Nothing contained in this bill shall be construed or held to authorize any interstate boycott or blacklist.

Mr. LOW. I would not, Mr. Chairman.

The CHAIRMAN. I understand that both gentlemen agree on that.

Mr. LOW. It would be shorter to leave it out, but you would not accomplish what you accomplish by leaving it in, even with that addition; because, while it would make the law perfectly explicit as to the boycott or blacklist, it still leaves the duty to you to make clear the right to strike, and the right to combine and to make trade agreements. That ought to be clearer.

The CHAIRMAN. You do not take the ground that they have not the right now to strike under the Sherman antitrust law?

Mr. LOW. No; but I think a great many are doubtful about it.

The CHAIRMAN. Are there any lawyers that advise that employees have not the right to strike under the Sherman antitrust law?

Mr. LOW. None that I know of.

The CHAIRMAN. I never heard of any.

Mr. LOW. That is why I stated in my original statement that the labor men were not lawyers, and they did not have lawyers at their command. They exist by the hundreds of thousands, and—

The CHAIRMAN. They have been represented before this committee repeatedly by lawyers.

Mr. LOW. As a mass they can command them; but they can not as individuals.

Mr. BANNON. They have a kind of innate fear.

Mr. LOW. Exactly. I do not think the law is invalid, but I think it is perfectly wise to set at rest that fear.

Mr. SCHIEFFELIN. Are there any other questions?

The CHAIRMAN. Do any other members of the committee desire to ask any questions?

Mr. LOW. In my opening statement I referred to an amendment that I thought desirable in the law, making it the duty of the Commissioner of Corporations, or of the Interstate Commerce Commission, if it was approved, to give their reasons. Can I file that with the committee in proper form?

The CHAIRMAN. Certainly.

Mr. LOW. It reads:

Which order shall contain or shall be accompanied by a statement of the reasons therefor.

The CHAIRMAN. What line and section is that, Mr. Low, please?

Mr. LOW. It would come in on page 5, line 4, after the words "foreign nations." It would come in section 10 and also in section 11.



The CHAIRMAN. Where would you have it in section 11?

Mr. Low. At the corresponding point. It would be on page 6, line 16, after the words "foreign nations."

The CHAIRMAN. "Which order shall contain or shall be accompanied by a statement of the reasons therefor."

Mr. Low. Yes. I would like to suggest another verbal change in the interest of accuracy. In the last section of the bill——

The CHAIRMAN. What line?

Mr. Low. Page 9, line 1. It now reads, "shall be entitled to the benefit of this immunity." It should read, "shall be entitled to the benefit of the provisions of this section."

The CHAIRMAN. Would you strike out the words "this immunity?"

Mr. Low. Strike out the words "this immunity."

The CHAIRMAN. Strike out "this immunity" and put in "the benefit of the provisions of this section?"

Mr. Low. Yes; "the benefit of the provisions of this section."

The CHAIRMAN. Line 1, page 9, strike out the words "this immunity" and insert in lieu thereof the words "the provisions of this section." Is that all the suggestions you have?

Mr. Low. Yes, sir.

The CHAIRMAN. There is an important roll call in a few minutes on the floor, and most of us would like to be recorded on the roll call. What time would it be agreeable for you to come back with your people, Mr. Low?

Mr. Low. It is now 20 minutes of 1.

The CHAIRMAN. Shall we say half past 1? Will that be agreeable?

Mr. Low. Certainly.

The committee thereupon took a recess until 1.30 o'clock p. m.

#### AFTER RECESS.

The subcommittee met pursuant to the taking of recess.

The CHAIRMAN. We are ready to proceed, Mr. Low.

Mr. TOWNE. I and my two associates here represent the Merchants' Association of New York, and I wish to ask what arrangements the committee will make for continued hearings on this bill. I would like to point out that we have had as yet little more than one week to consider it, the bill having been introduced on the 23d of March. In our case, the Merchants' Association of New York called a special meeting of the board of directors immediately on getting the facts before us. We had that meeting last Monday. We recognize the profound importance of this measure to all business interests, and we took no definite action at that time because we want more light on it. We are here, the three of us, to report back to our board. They will have a special meeting on Monday, if necessary, and we will be prepared to come here and speak the sentiment of that association as early next week as may be necessary. And I trust, Mr. Chairman, that a measure of such profound and vital importance as this will be given ample time for consideration, so that important bodies over the country may appear here and present such views as they may feel disposed, after having had opportunity to consider the

bill. I would ask if the chairman can give us some indication of what time we shall have.

The CHAIRMAN. It might aid in the solution of that if you could indicate when you would be ready to present the views of your association before this committee.

Mr. TOWNE. To do it properly we should have a week or so. By the end of next week we could do it fairly well. The measure is of such great importance that we need time to canvas our members in order to be sure that we speak with authority and that we represent the sentiment of our members. We hope you can arrange to give us a reasonable time.

The CHAIRMAN. Of course, I speak only for myself. Personally I am anxious to give everybody full opportunity to be heard. I suppose, of course, that the people interested are anxious to have the thing proceeded with as rapidly as is reasonable and consistent with those who desire to be heard. What would you say on that, Mr. Low?

Mr. Low. I was going to say that a bill similar to this has been introduced in the Senate and referred to the Committee on Interstate and Foreign Commerce; but I understand that on Monday that committee intends to ask to have it referred to the Judiciary Committee of the Senate. Of course we shall want to have a hearing there also.

The CHAIRMAN. Yes.

Mr. Low. It would be a great convenience to many of us if after this particular hearing is concluded if the hearings could be adjourned for, say, a week; then we could appear before the Senate committee and return to this committee, appearing before the two committees successively, so that we would not have to come to Washington first for one committee and then for another.

The CHAIRMAN. Your suggestion would be that we adjourn to-day to meet next Saturday?

Mr. TOWNE. Or Thursday or Friday.

The CHAIRMAN. How would next Thursday do?

Mr. TOWNE. That would be better, but even that is a short time. If you will permit me to point it out, Mr. Low and his associates have been at work on this measure for some weeks. The body that I represent—and it is also true of other important bodies all over the country—is deeply interested in this question, and these various bodies to which I refer are all considering it. But we have only had a few days in which to do this, not a sufficient time to consider it thoroughly and well and to permit us to speak before this committee authoritatively and with the knowledge that we are properly presenting the views of those we represent.

Mr. GOMPERS. I understood that Mr. Davenport, and Mr. Emory, I believe, desired to address the committee in opposition, and that some understanding or tentative arrangement had been made for them to address the committee on Monday. I am not so sure about it. My only purpose in suggesting this is that too great time may not be taken in hearing even those who are prepared to be heard.

The CHAIRMAN. So far as the committee is concerned, or so far as I am personally concerned, it will be perfectly agreeable to me to go right straight along continuously, day after day. Of course, I feel as though we ought to be reasonable about the time for the hearing.

The understanding, Mr. Gompers, was this: The people who propose the legislation were to be heard first, to present their views, and after that, Mr. Davenport and the other people in opposition to come in and be heard; and then in reply Mr. Low and the others who propose the legislation to be heard also. Now, I would like to consult the convenience of both of you. Mr. Maltby, a member of the subcommittee, has to be away next Friday and Saturday. He is one of the members of the subcommittee. While we are hearing this matter in the presence of the full committee so far as they are willing and able to attend, it is the subcommittee practically that is interested.

Mr. Low. Then before this session adjourns, whether it be to-day or on Monday, we ought to hear from the objectors to the bill. So far as the Civic Federation is concerned we want the best possible measure for the relief of the country. I think objections are often instructive. After we have heard from the objectors as well as those in favor of the bill, if there should then be an adjournment of a few days, such as Mr. Thom proposed, we would be able to develop both sides of the question, and perhaps be able by the time of the next hearing, to perfect the bill still further.

The CHAIRMAN. That is a matter for the parties themselves to arrange. The understanding is now that the proponents are to put their case in, then the opponents are to put in their case, after which the proponents will reply.

Mr. DAVENPORT. So far as I am concerned my convenience would be the convenience of the committee. I supposed there was a large number of gentlemen here who wanted to be heard in support of this measure. Of course we can best judge what we want to say in opposition to it after having heard what they have to say. But so far as I am personally concerned it does not make any difference to me.

The CHAIRMAN. Suppose we do this. Have you enough present to occupy the time this afternoon, Mr. Low?

Mr. Low. I should think so.

The CHAIRMAN. Suppose we go on this afternoon. We usually stop about 5 o'clock. Then, perhaps, if it is agreeable to Mr. Low and Mr. Davenport—Mr. Davenport, if he would be willing to do so, could come in and be heard Monday, and then Mr. Emory, or whoever they might desire to present. Then the hearings might be suspended for a few days, if agreeable, giving these gentlemen an opportunity to frame their reply.

Mr. TOWNE. I represent now neither proponents nor opponents, but a large body or organization throughout the country that is studying this question and that wants a reasonable time to mature their minds in order that we may come here and speak to this committee authoritatively. In giving us that time I think you will be saving your own time.

The CHAIRMAN. Would my suggestion be quite agreeable to you, Mr. Low?

Mr. Low. Entirely so.

The CHAIRMAN. Very well; we will proceed with that understanding.

Mr. Low. I should like to ask that Mr. Gompers be heard.

**STATEMENT OF MR. SAMUEL GOMPERS, PRESIDENT AMERICAN  
FEDERATION OF LABOR.**

Mr. GOMPERS. Mr. Chairman and gentlemen of the committee, you of course understand that in whatever representative capacity I appear before you it is that as representing the workmen who are organized and who undertake the effort to advance as well as protect the interests of all workmen. I say this now because before entering into the presentation of the thoughts that I have upon the subject under consideration I want just to make this remark in passing, and that is that in so far as the bill presented is concerned I have had little or nothing to do in the preparation of those features dealing with corporations and associations conducted for profit and owning stock, and also with the common-carrier clauses. Nor am I willing to say that in so far as the construction of the bill is concerned I know enough of it to give the bill per se whatever indorsement that I can—

The CHAIRMAN. That is, its legal construction?

Mr. GOMPERS. Its legal construction; yes, sir. The purposes of the bill in so far as they deal with the associations and organizations and corporations and common carriers have my indorsement, and the fullest possible indorsement that I can give. Such purposes as, for instance, that business men may have full and free opportunity for the growth and the development of their business, and that they may conduct their business upon the assumption that it is fair and reasonable until it is proven and demonstrated that it is otherwise.

Modern business can not be conducted upon the old notions. Development in industry does not admit of it. Development in transportation does not admit of it. The development and transmission of information does not admit of it. And therefore what may seem to some an anomaly that representatives of large corporations and business interests are here, in company with the representatives of workmen, advocating a line of policy to be shaped into law, yet the fact is that labor, or organized labor if you please, has realized for a long time, and realizes now—perhaps clearer now than ever before—the necessity for the fullest and the freest hand in the operation of business and industry and the performance of labor, and that in so far as interference by the Government is concerned it should be of the least possible character.

Addressing myself particularly to the interests that I in part represent I may say that despite the assurances of a number of men, both Senators and Members of the House of Representatives, when this Sherman antitrust law was in its tentative and formative state I still apprehended that lurking within those bills was the feature that covered the organizations of labor, and it was under that apprehension that with others I urged upon Congress the adoption of amendments to the then bill in order that it might specifically be stated in the bill that the organizations or associations of labor, instituted to regulate wages, hours of labor, and conditions of employment, and with the organizations of farmers and horticulturists, dealing in their own products, should be excluded from the operation of the law. This is not the language of the amendments which we suggested at the time, but they are substantially the provisions.

Mr. ALEXANDER. Have you got that language with you?

Mr. GOMPERS. Yes, sir.

Mr. ALEXANDER. Will you put it into the record?

Mr. GOMPERS. I can read it if you care to have it now.

Mr. ALEXANDER. Yes; read it, and it will go into the record.

The CHAIRMAN. You will find it in Mr. Hughes's speech the other day if you do not happen to have it there handy.

Mr. GOMPERS. I have it in my editorial in the American Federationist. This is the amendment which Senator Sherman made as a proviso to the bill in the Senate, while in the Committee of the Whole, it being an amendment that was drafted and fathered by Senator George, of Mississippi:

AMENDMENT.

*Provided, That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with a view of lessening the number of hours of labor or the increasing of their wages, nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with a view of enhancing the price of agricultural or horticultural products.*

The Senate in Committee of the Whole amended it by inserting the words "their own," so that in so far as it applied to agriculturist and horticulturist organizations, that the arrangements, agreements, and so forth, that were made "with a view of enhancing the price of their own agricultural or horticultural products." In that shape it passed the Senate. Then the entire bill was re-referred to the Judiciary Committee of the Senate and the committee brought in a reconstructed bill in which this provision was omitted.

I say again that the assurances were given that in the form that the bill was brought before the Senate by the Judiciary Committee, and as it passed that body, that it was not applicable to the organizations of labor nor the agricultural or horticultural organizations.

Substantially as it passed the Senate the bill became a law. I want to just repeat the statement that notwithstanding the assurances that others and myself received, and contending along that line, yet I always was apprehensive that at some time the courts might so decide, that the organizations of labor and of the farmers do come under the antitrust law. I think the chairman (Mr. Littlefield) will remember that in 1901, I believe, when the Judiciary Committee of the House had an amendment to the Sherman antitrust law under consideration, the representatives of labor urged the adoption of an amendment which directly and affirmatively excluded the labor organizations from the operations of the then pending bill and of the existing law.

The CHAIRMAN. Yes; I remember that. I was one of the seven that voted against it.

Mr. GOMPERS. Yes. I believe there were nine.

The CHAIRMAN. Seven or nine. You have the list there.

Mr. GOMPERS. Yes; it was nine. And some are not now Members of Congress.

The CHAIRMAN. That is the way I understand it.

Mr. GOMPERS. The Sherman antitrust law, either in fact or as now construed by the Supreme Court in its decision in the case commonly known as the *hatters' case*, makes it perfectly clear that under the construction the labor organizations come under its provisions.

The CHAIRMAN. I have a copy of the opinion here, if you would like the opinion itself.

Mr. GOMPERS. I have it. I am aware that the members of the Judiciary Committee are fully cognizant of the decision of the court, and I do not want unnecessarily to take time to read the law; but the decision of the court brings conspicuously to notice sections 1, 2, and 7 of the Sherman antitrust law, and for a clear presentation—or the best presentation which I can make—I find it necessary to read the three sections of the law which the court quotes in its opinion:

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee.

Let me revert back for a moment to section 1 and call attention to the fact that the law as construed by the court and as constructed makes this fact clear: "Every contract, combination in the form of trust or otherwise"—and I want to emphasize that word "otherwise," that it need not be a trust, it need not be injurious—but the mere fact that a contract has been made in the form of a combination or in the form of a trust or otherwise. In other words, it makes no difference whatever what the combination may do, whatever contract they may enter into that shall in any way restrain trade, even though it be to the advantage not only of those who participate in the contract, but be a public benefit, it is still, under the law as construed by the court, to be an illegal combination and punishable by the various methods named in the law.

Let me read section 2, omitting some words, so as to bring out the thought I have and that I desire to present to the committee:

Every person who shall monopolize, or attempt to monopolize, \* \* \* any part of trade or commerce among the several States or with foreign nations shall be deemed guilty of a misdemeanor, and, on conviction, punished as already stated.

In other words, an individual who undertakes to enlarge his business comes under the operation of this law. It is a curb upon individual initiative and development. The court in its decision takes the very evidence of the successful cooperation of employers with employees to maintain industrial peace as the evidence that these combinations or agreements are in restraint of trade. Indeed, Mr. Low this morning, in his address to the committee, called attention to the fact that the court quoted approvingly that out of 82 manufacturers of hats in the United States 70 were in agreement with the

union of hat makers, as the evidence of the success of the conspiracy between employers and these organizations, the conspiracy of the men in the organizations, the men of labor in their organizations.

May I say here in passing that I am not endeavoring, nor is it my purpose to indulge in such criticism of the Supreme Court or its decision that would directly or indirectly cast any reflection upon either the justices of the court individually or collectively. That is not my purpose nor is it in my mind.

The CHAIRMAN. As I understand it you complain of the statutes and not of the decision?

Mr. GOMPERS. I complain of the statutes.

The CHAIRMAN. You do not criticize the court; your criticisms are directed to legislation.

Mr. GOMPERS. To existing law as interpreted by the court, for until that decision it was an open or debatable question as to whether the labor organizations did come under the operations of the law.

Now, Mr. Chairman, let me say, in a word, that this so-called "Sherman antitrust law" is not an antitrust law, as its title assumes it to be. It is an anticombination law. It is a law against associated effort; it is a law something like the law which obtained two thousand years ago in Rome that made every form of association or organization which was not approved by the Emperor, unlawful and punishable with all sorts of penalties. Under it I might without expressing my own opinion, for a moment adopt as my own statement made by an organization of labor having this selfsame subject under consideration:

Against the dangerous powers of the nobles—

The CHAIRMAN. Will you give the name of the organization—or will you give that later?

Mr. GOMPERS. Yes. (Reading:)

Against the dangerous powers of the nobles, wise men of Europe, during the middle ages, nursed the free cities and the guilds. Against the free cities grown too powerful they raised the power of the whole people.

It would seem reasonable that against the power of massed capital such power as may be found in organization of men, as men, might well be used to advantage. With the land monopolized and the instruments of production and transportation grown so expensive that they can be owned and controlled only by the very rich as individuals or by combinations of capitalists, the owners of such instruments will be masters, not only industrially, but politically, nay, over life and death; unless the individual freedom of man, as man, is so protected that he may combine with others in his own interest and for the protection of individual liberty and of democratic institutions.

As conditions now stand the worker is without tools and, usually, without land. His inherent necessities compel him to seek employment in order that he may live. Capitalists in possession of the land and the tools of production need the workers to make the former profitable. Surely the inherent necessity of the worker may be trusted to induce him to labor on conditions that will enable him to live and reproduce his species. There is no need, and no wisdom, in converting the law into a lasso with which the workers may be caught, led to the employer and made to labor against his will.

Judge Caldwell, in his dissenting opinion in the *Oxley Stave Co. v. Coopers' Union*, truly says—

The CHAIRMAN. Have you the number of the report of that case, so that we can make the reference?

Mr. GOMPERS. I have not.

The CHAIRMAN. It was in the Federal Reporter, I suppose?

Mr. GOMPERS (reading):

The only weapon of defense the laborers can appeal to is the strike or the boycott, or both. \* \* \* If these weapons are withheld from them, then, indeed, are they left naked to their enemies. One class of men can not rely for protection and the maintenance of their rights upon the justice and benevolence of another class who would reap profit from their oppression. They must be in a position to compel respect, and make it to be the interest of their adversary to grant their reasonable and just demands. Laborers can only do this by making common cause—by organization and collective action.

Mr. DAVENPORT. I would like to have the citation of that first one.

The CHAIRMAN. Would you like to put the whole paper in?

Mr. GOMPERS I only quoted a portion.

The CHAIRMAN. You can put it all in if you wish.

Mr. GOMPERS. It is not necessary to put in the whole paper. What I just read was from a report made by a committee of the San Francisco Labor Council to that body, and after a full discussion it was adopted unanimously.

Under the law as it now stands construed by the court, it is apprehended there is nothing which a labor organization can do in furtherance of the interests of labor, nothing which it can do in protection of the rights or interests of its members, but what is either enjoined or punishable both by fine and imprisonment. We contend that equity power and jurisdiction, discretionary government by the judiciary for well-defined purposes and with specific limitation, granted to the courts by the Constitution, has been so extended that it is invading the field of government by law and endangering individual liberty. As government by equity, personal government, advances, republican government, government by law, recedes.

I need not say at this late stage of appearing before committees, both this honorable committee and others of Congress, that we favor the enactment of laws which shall restrict the jurisdiction of courts of equity to property and property rights, and shall so define property and property rights that neither directly nor indirectly shall there be held to be any property or property rights in labor, or the labor power of any person or persons.

Mr. Chairman, we have fallen, all of us have fallen, into the misuse of a word in our language that has led to untold confusion. We speak of the working man or the working woman not in those terms, but as labor, labor. And under the confusion into which we have been led by reason of the use of that term—labor as applied to man and woman—comes much of the difficulties with which we have to contend. We all have seen in the press of the past week or two editorials in which the thought finds expression that there must be equality of treatment of "labor and capital." No less than a distinguished Member of the present Congress introduced a bill in which there is no provision mentioned in so far as concerns the workman or the workwoman or the organizations of either—neither mentioned nor referred to; and he, too, with his great intellect, and I believe not unkind feeling, says that such a bill would be equal in its provisions to capital as well as to labor.

Now, what is capital? I shall not attempt to give a scientific definition of the term, but simply that which we all understand. It will be good enough for all the purposes of my statement. Capital is the



product of human effort used for the purpose of producing more wealth. It may be inanimate things and is largely so.

What is labor? Is it an inanimate thing? Taking it in its accepted sense, is labor an inanimate thing? Labor is the effort of the human, breathing man and woman. You can take capital and transport it to the other end of the world. You can not do that with labor. You can not differentiate the labor of the man or the woman from their breathing, respiring body and heart and brain. It is an abuse of the use of ordinary terms in our language—it is an abuse of the very essence of essential principles—to place in the same category capital and labor, labor and capital.

You can make regulations for capital and the owner of the capital may leave. You may not deprive even him of his own personal liberty though you make all the regulations you may so far as concerns capital; but you can not make one regulation in so far as labor is concerned, in the ordinary acceptance of that term, without it affecting the laborer—his heart, his body, his brain.

It is because of this misconception that is so prevalent that we find learned screeds in editorial columns and speeches upon the floor of Congress and elsewhere dealing with the subject, with the terminology of which they are entirely deficient. It is because of this that we find editorials headed "Labor and Privileges," because we want to have the human rights accorded to us, and to which we are entitled; rights which the workman had before the state—the ownership of himself. With the abolition of human slavery in the dim, distant past man became owner of himself, and with the ownership of himself and in himself he possessed the inherent ownership of his labor power, and to do with that just as he pleased—to sell it or to withhold it, as best served his purpose and his interests. There may be combinations in the products of labor, and these may be properly dealt with by the state in order that the rights of the people may be protected and their interests furthered.

I want to say here again that I believe it is the part of unwisdom to attempt to unwarrantably interfere by law in the conduct of the business in the interest and for the people of our country and of our time. But there must be a different concept of these two factors in human society: The one not capital, but the owner of capital and dealing by law with capital, the product of labor; and the other, dealing with the human, the man who labors.

I see that there are manifestations of opposition to the passage of this legislation. May I say, Mr. Chairman, that I received a copy of a circular in which this bill or this legislation is denounced as the most dangerous and diabolically ingenious measure yet proposed to Congress.

Mr. ALEXANDER. Who says that, Mr. Gompers?

Mr. GOMPERS. Mr. James A. Emory, counsel for the National Council for Industrial Defense.

Mr. EMORY. Guilty, if your honor please.

The CHAIRMAN. He is here.

Mr. GOMPERS. That is not the only thing either. This was placed in my hands—I can not remember how I got it; I know I did not take it. There is only one other species of circulars that are sent through—I do not know whether it is this National Council for Industrial Defense, because this is a new title, or a new organization, I do not

know which—but sent out by the same gentlemen, Mr. Emory and his colleague, Mr. Davenport, and some other gentlemen whom it is not necessary to advertise. This circular, from which I quoted, denounces this bill and this species of legislation. One would imagine that if these gentlemen represented employers of labor who have an intelligent conception of modern industrial conditions and modern commercial conditions, that they would gladly cooperate with the best spirits in all walks of life to try to obtain relief from an intolerable condition. But no. There are some men, like that sort of piscatorial creature who swings around in the water and besmirches the entire pool. There is nothing that the labor organizations can aid in securing in the form of remedial legislation to remedy any existing evil but what will meet with the undying antagonism of these gentlemen of the legal profession whose names I have mentioned, and perhaps those whom they represent.

Mr. FULLER. Amen.

Mr. GOMPERS. I want to advertise Mr. Emory just once more by mentioning his name. He has the facility or the adaptability of always butting in when I am talking. I do not know for what purpose; but it is a good confession to make and to have on the record. I want to repeat that there is not any legislation which the organizations of workmen can advocate to remedy an evil which is not met with their undying opposition, and to that he says "Amen."

Mr. EMORY. Pardon me—

Mr. GOMPERS. Pardon, not now. You may need it worse some time. I can not give it to you now.

There are some who entertain the hope that the organizations of labor will become disbanded, that their funds will be confiscated or mulcted in damages; that the earnings, the savings of some of the men, little as they may be, will be taken by decrees of the courts, and that the organizations of labor will be swept off from the face of the earth. I do not know what hopes some men entertain in that regard, but I say this, not only advisedly, but from a careful study of the past history of the development of the working people of the world and their various forms of organization, and the battles that they have had to make, the obstacles which they have had to overcome—that they were outlawed, that they were criminal, that the men were punished not only by imprisonment, not only by being branded with red-hot irons and stamped forever in servitude, but hanged to the gibbet, because they were banded together for the purpose of protecting themselves against the avarice and the tyranny of their employers.

Despite all the laws that outlawed them, despite all the decrees that condemned them, despite all the sentences that sent them to the jail and the branding iron and to the gallows, the organizations of labor still lived, and they will live, they will live. They have done so much to advance the interests of the working men and women and the children of the workers, they have brought so much sunshine into the homes where gloom before prevailed, that you could not drive the spirit and the feeling and the knowledge for and of labor organizations out of the hearts and minds of the working people.

Suppose it were possible that you could drive out of our lives the organizations that have protected us, our wives, and our little ones, and done so much for us; suppose you would succeed by an injunction from Judge Gould in prohibiting us from declaring that the

Bucks Stove and Range Company products are unfair; supposing you succeed in enjoining us and make that injunction permanent; supposing you take our funds away by damage suits; supposing you do send us to prison because we believe that we have a right to protect that which we own, namely our power to labor; supposing you do all these things—what then? You may drive us into secret organizations, perhaps not us, but those who will follow. You may drive the men and women of labor into organizations oath bound and secret; you may drive them into the dark.

There are two things that the American workmen have learned. One of them is some of the Declaration of Independence. They have been fed upon that. They are not yet satiated with it. They are more in love with it than I think most people are. The next is their organizations of labor. They love our country. They revere our institutions upon which our Republic is founded, and they know that within that Republic are their organizations of labor, their voluntary associations with their fellows that have done so much, and they are going to organize and remain organized—if not in the way that you will permit it by law, they will still organize and remain organized, and neither ukase nor injunctions are going to drive the organizations of labor out of this country.

But supposing you force them to do in secret the perfectly legitimate human activities that they have always performed in the open. I need not say to you, gentlemen, learned as you are, that men in the open where they can express their views thoroughly, where they can promulgate to the world their thoughts, their hopes, are always more careful, intelligent, and circumspect than they are or would be in considering the same questions in secret, oath bound; and where they are simply free from the criticism of the general public.

Now, what? Industry has developed, is developing still further, and will still continue to further develop. In so far as modern industry is concerned, it is largely impersonal. It is a matter of profit. It is a matter of dividends. The human interest in industry, so far as the relations between employer and employees are concerned, is almost absent. Such human interest as the effort which gentlemen of the character and type of Mr. Low and others, who are trying—and we are helping in our way—to bring about a better recognition of the interdependence of man upon man, whether he be employer or employee—to bring about better relations between them. But in the impersonal character of industry to-day what hope has the workingman to protect his rights and his interests, his wages, to obtain reasonable hours of labor, if he, in modern industry, must act as an individual?

I am afraid to give my mind the range of the possibilities of such a condition of affairs—the industries of the country developing and concentrating and the associations of labor gone, and each man acting as an individual and trying to work out his own means of protecting his rights or his interests, without the ability to effectively protect and promote his interests, seeking a redress of his injuries, of his feelings, of his wrongs in his own way.

I contend, Mr. Chairman and gentlemen, for our organizations of labor that they are the greatest conservators of the public peace. In all the country where can you find the bona fide organizations of labor even participating in these demonstrations of a riotous character, such

as we have seen in some of the cities? I do not want to add anything to their troubles, when men are unemployed and suffering, as so many of them are suffering to-day. They are entitled to some little pity, some little consideration, despite their ignorance, despite their foolhardiness, despite the wickedness of one, or two, or more; but is it not true that even in our present, our awful present industrial situation, when there are hundreds and thousands of workmen and workwomen who are walking the streets of our country idle, without the opportunity of earning their livelihood, I ask you where in the whole world you could find an equal number of men unemployed, and the general tranquillity and the safety of life and property to obtain as it obtains in our own country? It is true that the influences of American ideas and ideals have contributed much, but what about the organizations of labor that have instilled self-respect and mutual dependence between workmen?

Mr. Chairman and gentlemen, we are appreciative of the liberties as citizens which we enjoy. But there can not be differentiated from that liberty the right to the exercise of our normal activities as wage-earners. To guarantee to the workman academic rights which he does not want and deny him the rights to which he is entitled and which are of advantage to him is to insult his intelligence as well as his manhood. Modern industrial conditions can not be changed. They are not going back. You can not turn the wheels of industry back, and you would not dare do it if you could. And the reason why the law is not enforced, in so far as other industries are concerned, is because of the recognition that you would have to force industry back fifty years to comply with the terms of the present law. Industry is not going to turn back. A law is made for the government of men, but it is not a fetish before which you must bow and scrape before you even look at the words and letters which construct the law. A law is made to further the interests or the convenience or the rights of a people, and when that law has failed to perform its purpose, or where it is clearly a law that has no standing in our day, if one or the other must go, industry can not go. The law must be either amended or ended.

I do not know whether you are aware of it, gentlemen, but since the decision of the Supreme Court of the United States was handed down, 75 workmen in New Orleans have been arrested under the Sherman antitrust law, and the indictment charges them with conspiracy in ordering a strike.

Mr. ALEXANDER. Under the State law?

Mr. GOMPERS. No, sir: under the Federal Sherman antitrust law.

Mr. STERLING. Was it anything connected with the strike, or is it related to the destruction of property?

Mr. GOMPERS. Not even an allegation of it.

Mr. STERLING. It was perfectly peaceful?

Mr. GOMPERS. A perfectly peaceful strike. There was no allegation of violence.

Mr. MALBY. Have you a copy of the indictment?

Mr. GOMPERS. No, sir. A certain number of men were arrested, I believe—was sitting under the sign of the hammer. I think that is the way it was.

The CHAIRMAN. *Legislation.*

Mr. GOMPERS. Perhaps that may be so. I believe now they were stevedores.

The CHAIRMAN. They are longshoremen.

Mr. ALEXANDER. Roustabouts they are called down there.

Mr. GOMPERS. No. Stevedores or longshoremen. A certain firm objected or refused to pay the prevailing rate of wages. The men quit. They came to a dispute and the strike was on. The Cotton Trades Council, I think it was—the workmen in the cotton industry—decided that the other workmen should also strike, for the reason that if the wages of these men, in the first instance, were reduced it would involve a reduction of wages of all the others, and they all quit work. The employer, after considering their conditions, conceded the demands of the men—that is, for a restoration of wages. Then all the men returned to work. The boats went out with their cargoes, and when they were out a day or so the employer went before the grand jury of the New Orleans circuit court—the Federal grand jury—and procured an indictment against 75 of the men who had participated in the council in which that strike was inaugurated; and this, I say, was under the Sherman antitrust law, since the decision was rendered by the Supreme Court. This case is to be heard in the courts.

Mr. MALBY. There was nothing in it but a strike?

Mr. GOMPERS. That is all.

Mr. MALBY. There was no boycott; just simply a strike? There was no picketing?

Mr. GOMPERS. That was not alleged. I do not think the picketing comes under the Sherman antitrust law. But combination in restraint of trade, that is what was alleged.

The CHAIRMAN. I think the indictment charged a conspiracy in restraint of foreign and interstate trade, these people being engaged in both foreign and interstate trade.

Mr. GOMPERS. Yes.

Mr. CAULFIELD. Has not the prosecution of those cases been ordered suspended by the Department of Justice?

Mr. GOMPERS. I have no knowledge upon that subject. Mr. Keefe, has that been ordered?

Mr. KEEFE. Yes; the prosecution was withheld. Those were instructions from the Law Department, I presume.

The CHAIRMAN. I do not think that exactly states it right. I have a letter from the Attorney-General covering the whole case. There was some question about the validity of the indictment. The Department of Justice is examining into it to ascertain whether the proceedings are regular, and has not issued any affirmative instructions that tend to either impede or promote the progress of the judicial proceedings.

Mr. KEEFE. The instructions were to withhold the prosecution of the case.

The CHAIRMAN. I do not get that impression from the Attorney-General's letter. Of course, you may be right about it, but I see nothing in the letter of the Attorney-General to indicate other than that the Department of Justice is considering the matter.

Mr. GOMPERS. Well, there is no question but what they were indicted. That is the statement I made.

The CHAIRMAN. You are correct about that.

Mr. GOMPERS. As to whether they will be prosecuted, of course none of us can say; but they are liable to prosecution under the indictment unless it is nolle prossed.

The CHAIRMAN. I am not advised as to the details. Whether they proceed depends altogether upon the facts that exist and the charge under the indictment.

Mr. GOMPERS. Addressing myself for a few minutes to the bill itself, let me say, as I have already said, that I give the fullest support I can. I am authorized to say that—for the purpose that the bill has in view, in so far as to corporations owning capital stock, and common carriers, but so far as labor organizations are concerned we are averse to the registration of the labor organizations.

The CHAIRMAN. May I inquire right there, please. The labor organizations are not incorporated organizations; they are simply voluntary associations?

Mr. GOMPERS. Yes, sir; voluntary associations. Most of them are unincorporated. Some are incorporated, but most of them are not.

The CHAIRMAN. Is your American Federation of Labor an incorporated or voluntary association?

Mr. GOMPERS. It is a voluntary association of associations.

The CHAIRMAN. That is, the most of them are also voluntary associations?

Mr. GOMPERS. Yes, sir.

The CHAIRMAN. But some of them are legally incorporated?

Mr. GOMPERS. Very few. I believe some of the railroad brotherhoods are incorporated. How about that, Mr. Garretson?

Mr. GARRETSON. None; the Order of Railway Conductors is not incorporated.

Mr. GOMPERS. There are very, very few, sir, of the labor organizations that are incorporated.

The CHAIRMAN. Have you in mind now any that are legally incorporated?

Mr. GOMPERS. I know there are one or two. I was under the impression that the Order of Railway Conductors was, but Mr. Garretson, its chief executive officer, who is here, says it is not.

The CHAIRMAN. Which are those that are incorporated, if you can remember?

Mr. GOMPERS. I could not tell you now.

The CHAIRMAN. But as a rule they are unincorporated?

Mr. GOMPERS. Unincorporated; yes, sir.

The CHAIRMAN. And you do not think these associations should be subjected to this provision in relation to registration, as I understand you?

Mr. GOMPERS. Yes, sir; I think we ought not to be required to register.

The CHAIRMAN. That proposition under the bill is to register in order to get what might be termed immunity under the act.

Mr. GOMPERS. Yes, sir.

The CHAIRMAN. And you do not think your associations ought to be required to register in order to get immunity?

Mr. GOMPERS. I think we ought to be placed in a position at least as the organizations of labor were before the Sherman antitrust law was enacted.

The CHAIRMAN. Is it your view that the purpose of the legislation is to relieve the Federation of Labor, for instance, of the embarrassments of the Sherman antitrust law?

Mr. GOMPERS. Not only the American Federation, but the other labor associations or organizations.

The CHAIRMAN. Is it your idea that is the purpose of the legislation to relieve the organizations of employees from the operation of the Sherman antitrust law?

Mr. GOMPERS. I can not tell you, sir; but I have my doubts.

The CHAIRMAN. If that is not the purpose, are you in sympathy with it?

Mr. GOMPERS. I want to explain that, if I may?

The CHAIRMAN. Certainly.

Mr. GOMPERS. And say that taking as a basis the amendment to the Sherman antitrust law when it was still in a formative state, and to which I referred earlier in my remarks—the provision that passed the Senate—taking that as a basis, labor has prepared this and wants to offer it as an amendment to the pending bill. First, the provision to eliminate from the bill those parts which refer to organizations and corporations not for profit and without capital stock, and then to have these amendments; and in these two amendments the representative of the farmers' organization or union is by instruction giving us his aid and support.

The CHAIRMAN. Who is the head of the farmers?

Mr. GOMPERS. Mr. Barnett, of the Farmers' American Society of Equity, and Mr. Barrett, of the American Farmers' Union. I can not speak for the Farmers' Union other than that having communicated with them, through their representatives, and giving them a statement of what we apprehended and what we asked, the secretary sent a telegram stating that our efforts have the hearty approval of his organization and their support in every way.

The CHAIRMAN. Are these organizations you speak of differentiated from what we know as the Grange?

Mr. GOMPERS. They are part of the Grange, most of them.

The CHAIRMAN. Are they affiliated with the American Federation of Labor—that is, the two you speak of?

Mr. GOMPERS. No, sir; except as we may combine on general interests. We exchange fraternal delegates to each other's conventions and mass meetings, and at conferences of all sorts we have either a representative of labor there in theirs, or they have a representative of the farmers in our conferences.

The CHAIRMAN. And while in a general way you work in harmony for common purposes, you are not so allied that your federation exercises any control over them?

Mr. GOMPERS. No, sir.

The CHAIRMAN. What is the address of these two gentlemen, please?

Mr. GOMPERS. Mr. C. M. Barnett is president of the Farmers' American Society of Equity, and his headquarters are in the Clayton Building, Indianapolis, Ind. I have not Mr. Barrett's address with me; it is somewhere in Georgia. I should say that, in reply to the notification of that society of farmers that this hearing was to take place to-day, their secretary said that Mr. Barnett could not be here, but that Mr. Nelson, a member of their executive board, would be authorized to act as their representative before this committee to-day.

The CHAIRMAN. Mr. Nelson is here, I suppose?

Mr. GOMPERS. I think he is.

The CHAIRMAN. What is that organization composed of—practical farmers?

Mr. GOMPERS. Yes, sir.

The CHAIRMAN. Or of people simply interested in agriculture? It is composed of practical operating farmers or farm laborers?

Mr. GOMPERS. Operating farmers. If you will permit me to read the further amendment you will observe what they ask, which we have given our adherence to, and they have given theirs to our proposition. It is this:

That nothing in said act or in this act is intended, nor shall any provision thereof be enforced so as to apply, to organizations or associations not for profit or without capital stock, nor to the members of such organizations or associations.

That nothing in said act, or in this act, is intended, nor shall any provision thereof hereafter be enforced so as to apply to any arrangements, agreements, or combinations among persons engaged in agriculture or horticulture, made with a view of enhancing the price of their own agricultural or horticultural products.

Now, I want to read for information from the British trades dispute act. It will not occupy more than two or three minutes. The act was passed by Parliament in December, 1906:

1. It shall be lawful for any person or persons acting either on their own behalf or on behalf of a trade union or other association of individuals, registered or unregistered, in contemplation of or during the continuance of any trade dispute, to attend for any of the following purposes at or near a house or place where a person resides or works, or carries on his business, or happens to be (1) for the purpose of peacefully obtaining or communicating information; (2) for the purpose of peacefully persuading any person to work or abstain from working.

2. An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute shall not be ground for an action, if such act when committed by one person would not be ground for an action.

3. An action shall not be brought against a trade union or other association aforesaid for the recovery of damage sustained by any person or persons by reason of the action of a member or members of such trade union or other association aforesaid.

The CHAIRMAN. Have you the full act?

Mr. GOMPERS. These are the three sections, and then there is the enacting clause.

The CHAIRMAN. What connection does that have with the act of, I think, 1873, passed by Parliament?

Mr. GOMPERS. The law of 1875, I think it was, was rendered practically nugatory by the Taff-Vale decision which so intensified the feeling of British workmen and the British public generally, that it resulted in the trades dispute act.

The CHAIRMAN. Does this operate to repeal the act of 1875, as you understand it?

Mr. GOMPERS. It affirmatively takes its place and wipes out the effect of the Taff-Vale decision.

The CHAIRMAN. Have you a citation so that we can get the case to which you refer?

Mr. GOMPERS. You know. Mr. Littlefield. I am not a lawyer.

The CHAIRMAN. I thought perhaps you had a citation of the case; where it was reported.



Mr. GOMPERS. No; but I can get it. Mr. Low has——

The CHAIRMAN. Has Mr. Low got it?

Mr. Low. I have a copy of the act.

The CHAIRMAN. No; I wanted the citation of the case, so that we could look the case up.

Mr. GOMPERS. I am of opinion there would be little difficulty in obtaining it. Surely you have ample facilities to obtain it. The Library of Congress certainly has a compilation of laws upon that subject. I am satisfied it has.

The CHAIRMAN. Very well; if you think we can find it without any trouble in such a compilation.

Mr. GOMPERS. I have here some citations of decisions and opinions in several courts in the matter of strikes which I should like to submit.

The CHAIRMAN. And make them a part of your remarks without reading?

Mr. GOMPERS. Yes, sir.

The CHAIRMAN. You may do so.

(The citations referred to by Mr. Gompers are:)

CASEY v. CINCINNATI TYPOGRAPHICAL UNION, No. 3, ET AL.

(45 Fed. Rep., 135.)

[Lawyers' Reports Annotated, Book 12.]

LAWFUL COMBINATIONS OF WORKMEN.

Combinations of artisans for their common benefit, as for the development of their skill, or for protection from overcrowding of their trade, are not opposed to public policy. (Greenhood, Pub. Pol., 648, citing *Snow v. Wheeler*, 113 Mass., 179; *Carew v. Rutherford*, 106 Mass., 1; *Com. v. Hunt*, 4 Met., 111; *Wolfe v. Matthews*, L. R. 21 Ch., Div. 194; *Reg. v. Rowlands*, 17 Q. B., 671.)

It is not illegal for workmen to form and act as an association to protect themselves against "encroachments" of their employers. (*Snow v. Wheeler*, 113 Mass., 179.)

A combination between stevedores of a port to fix rates and penalties for their violation, is not invalid. (*Master Stevedores Assn. v. Walsh*, 2 Daly, 1; *Collins v. Locke*, L. R. 4 App. Cas., 674; *Sayre v. Louisville Union Ben. Assn.*, 1 Duvall, 143; *Hilton v. Eckersley*, 6 El. & Bl., 47; *Reg. v. Rowlands*, 17 Q. B., 671; 5 Cox, Cr. Cas. 436; *Reg. v. Duffield*, 5 Cox, Cr. Cas., 404.)

The legality of an association depends on the means to be used for the accomplishment of its object, whether such object be innocent or otherwise. (*Com. v. Hunt*, supra.)

COMMONWEALTH v. HUNT ET AL.

(4 Metcalf, 111.)

[38 American Decisions, 354, 358.]

Justice SHAW:

354. Stripped, then, of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this: That the defendants and others formed themselves into a society and agreed not to work for any person, who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman.

The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged.

358. Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread; supposing

a number of those neighbors, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not, that they would introduce another baker; and on his refusal, such other baker should, under their encouragement, set up a rival establishment, and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances, where each strives to gain custom to himself, by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another—that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited.

ARTHUR ET AL. V. OAKES ET AL.

[63 Fed. Rep., 321.]

Justice HARLAN:

These employees have taken service first with the company, and afterwards with the receivers, under a general contract of employment, which did not limit the exercise of the right to quit the service, their peaceable cooperation as the result of friendly argument, persuasion or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public. If, in good faith and peaceably, they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free actions of others, they can not be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation, and could not be attributed to employees exercising lawful rights in orderly ways, or to the receivers, when, in good faith and in fidelity to their trust, they declare a reduction of wages, and thereby cause dissatisfaction among employees, and their withdrawal from service.

Same case, page 327:

We are not prepared, in the absence of evidence, to hold, as matter of law, that a combination among employees, having for its object their orderly withdrawal in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages, is not a "strike," within the meaning of the word as commonly used. Such a withdrawal, although amounting to a strike, is not, as we have already said, either illegal or criminal. In *Farrer v. Close* (L. R. 4 Q. B., 602, 612) Sir James Hannen, afterwards lord of appeals in ordinary, said:

"I am, however, of opinion that strikes are not necessarily illegal. A 'strike' is properly defined as 'a simultaneous cessation of work on the part of the workmen;' and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be a part of a combination for the purpose of simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton v. Eckersley* (6 El. & Bl., 47, 66); or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an agreement entered into between employers and employees, or any other lawful purpose."

[Amer. & Eng. Ency. of Law 2d Ed., Vol. 18, p. 83, under title "Labor Combinations."]

These laws for the protection of trade have, in recent years, been materially modified by the admission of exceptions, as industrial progress has rendered specific applications of the principle no longer necessary. The most notable exception, perhaps, is that in favor of labor combinations. This is due in England and in Canada to the passage of express statutes, but in the United States the admission of the exception is largely due to the action of the courts themselves.

**OXLEY STAVE CO. v. COOPERS' INTERNATIONAL UNION OF NORTH AMERICA, ET AL.**

[72 Fed. Rep., 698.]

No one can question the right of the defendants to refuse to purchase machine-made packages, or of goods packed in them, or, by fair means, to persuade others from purchasing or using them. If that is all that is implied by a boycott, as insisted by defendants, it is difficult to see where they violate any law, although it might injure the complainant's business. It has been decided, however, that while such action would not be unlawful by an individual, a combination and conspiracy to accomplish the purpose would be an illegal act.

**GRAY v. BUILDING TRADES COUNCIL.**

[91 Minn., 171; 97 N. W., 663, 1118; 103 Amer. State Repts., 491.]

2. *By employees.*—The right of workmen to combine and organize for the purpose of improving their conditions can not be questioned. They may, in order to compel their employers to accede to their demands, quit the service singly or in a body, persuade other workmen to unite with them in furtherance of their purpose, and refuse to allow their members to work where nonunion men are employed. They may refuse to have any sort of dealings with employers of nonunion labor. This doctrine is recognized by the Minnesota court in the principal case: (See, also, *Clemmitt v. Watson*, 14 Ind. App., 38; 42 N. E., 367; *National Protective Assn. v. Cumming*, 170 N. Y., 315; 88 Am. St. Rep., 648; 63 N. E., 369; 58 L. R. A., 135.)

**MR. GOMPERS.** In conclusion, let me say that, in my judgment, speaking not only as president of the American Federation of Labor and as a representative of workmen, but as an American citizen, I believe firmly that there is no question before this Congress, possibly, nothing equal in importance to this question which can arise in a very long time. It ought not to be deferred until some other time; it ought not to be postponed until a hereafter. The workmen of the country feel that they have been outraged; that their interests have been invaded. I could not interpret to you in words the feeling or reflect their sentiments or views, even if I should attempt to do so, and no matter what time I might take in so doing. The men of labor of this country feel outraged, I repeat; they feel that they have been robbed; they feel that they have been shorn of the only protection that they have—their organization, the right to combine, the right to associate, the right to help each other, the right to help bear each other's responsibilities and burdens, the right to protect themselves from greed, from the rapacious. For, in truth, we must bear this in mind. We have not any hesitancy in saying that the large majority of employers are fairly inclined, but it is equally to their protection, as it is to the protection of the men who labor, that we organize and have all the fullest rights of our normal activities as workmen and citizens in order that we may compel the man who is always nibbling at the wages of workmen—that we can protect the fair-minded employers from the nibbling wage-cutting policy and niggardliness of the unfair and antagonistic employer.

In the interest of men of labor, the women of labor, of American manhood and womanhood and citizenship, I make this appeal to you gentlemen of the Judiciary Committee, that we can not wait much longer for relief; and if I judge the temper of the American workman accurately, and I think I do, they are going to hold to a strict accountability the men or parties, whoever and whichever they may be, who fail to fairly respond to this urgent appeal.

The CHAIRMAN. Now, Mr. Gompers, a word. Would this amendment you suggest, if it became a law, authorize the prosecution of such a boycott as was attempted in the Danbury hatters' case, which was in violation of the Sherman antitrust law? Is that the purpose?

Mr. GOMPERS. One of the purposes: yes, sir. That case was brought under the Sherman antitrust law.

The CHAIRMAN. Yes. And the purpose of the amendment you have offered is to relieve you from the operation of the Sherman antitrust law as construed by the court in that case?

Mr. GOMPERS. Yes, sir.

The CHAIRMAN. And to authorize that kind of an interstate boycott?

Mr. GOMPERS. Yes, sir.

The CHAIRMAN. Do you, as the representative of organized labor, favor the boycott, both as an interstate and a local proposition?

Mr. GOMPERS. I do, sir.

The CHAIRMAN. And your organization stands for that?

Mr. GOMPERS. It does, sir.

The CHAIRMAN. You filed a petition of intervention in the Danbury hatters' case on the ground that it was one of the fundamental purposes of the organization, and for that reason you had a vital—

Mr. GOMPERS. Your assumption is wrong. It is not the fundamental purpose of the organization. It is only one of the means.

The CHAIRMAN. I may be wrong about that. I was simply speaking on the basis of the expressions contained in your petition, which in part reads as follows:

\* \* \* and that a decision herein in favor of the plaintiff in error would seriously obstruct and hinder the said American Federation of Labor, petitioner, in carrying out the purposes for which it was organized, and destroy, at least to some extent, its usefulness to its members, and would likewise and in like manner injure said members.

\* \* \* \* \*

First. That the constitution of said American Federation of Labor, petitioner, makes special provision for the prosecution of boycotts, so called, when instituted by a constituent or affiliated organization, as is described in the complaint filed in the district court by the plaintiff in error herein, through the agency and pursuant to the approval of the executive council of petitioner; but what are alleged in said complaint to be boycotts are in reality legal and proper proceedings set on foot and carried on in order to accomplish lawful ends of your petitioner and the said affiliated or constituent associations.

I suppose that accurately states the attitude of your organization?

Mr. GOMPERS. Yes, sir; but that is not one of the fundamental principles.

The CHAIRMAN. Well, your constitution provides for the prosecution of boycotts, does it not?

Mr. GOMPERS. No, sir.

The CHAIRMAN. But this petition, signed by the American Federation of Labor, Samuel Gompers, and Frank Morrison, by T. C. Spelling, attorney, says:

First. That the constitution of said American Federation of Labor, petitioner, makes special provision for the prosecution of boycotts.

I know nothing about it except what I see here.

Mr. GOMPERS. The constitution makes provision for the selection of a committee on boycotts, and also regulates the manner, or, rather, restricts the number of boycotts which an organization can apply for indorsement, and it also restricts the central bodies from indorsing certain boycotts.

Your questions make it necessary for me to say just a word more, if I may.

The CHAIRMAN. Certainly.

Mr. GOMPERS. You must bear in mind that in the case in point—the hatters—their organization has had a continuous history. There has been a continuous history of the organized hatters for over five hundred years. From the old-time guilds they have their records. There is that esprit de corps, there is that feeling of mutuality of the old-time chapel, as it was and is called in the printing trade, which also obtains among the hatters. They have had and have agreements with 70 of the largest hat manufacturers in America. They meet every year and agree upon wages, hours, and conditions of employment. They got into a dispute with Mr. Loewe; the merits of it I shall not attempt to discuss. But they contended for conditions of employment, conditions of labor, wages, etc.—whatever they were—which obtained throughout the trade among the workmen employed in the other factories. To these Mr. Loewe objected. They came to a disagreement. Whatever the merits were or the demerits were I shall not attempt to discuss, but they came to a disagreement. It was necessary that the men in the trade—the hatters—must fight in order to maintain that scale of wages. Otherwise how could they expect these other 70 manufacturers to pay the scale, to pay decent wages which would give the men an American standard of living? It was a matter of self-defense. They had to fight. They will fight, and I will help them to fight if I can. Any set of workmen or workwomen in this country who want help in protecting their interests or advancing their rights, I shall, so long as life remains in me, try to help to the very best of whatever little ability I may have; and whatever that may involve, too. And I want to say that in my 58 years of life I have been a law-abiding citizen. There is no man who can ever point to any act in my whole life that reflects to my discredit as a man and as a citizen. I want to assure you on my word of honor that so long as I live I will never buy a Loewe hat or a Bucks stove or range until these gentlemen come into agreement with organized labor and grant us conditions of fairness. Then they will get our support and help. Until then, you may call it by any other name—boycott or no boycott—but I won't buy your hats anyhow.

The CHAIRMAN. Mr. Low, I am told that Mr. Garretson, who is here from some distance, would like to be heard, in order that he may leave.

Mr. Low. Yes, sir. Mr. Gompers, you know, represents the American Federation of Labor. There are a number of important organizations known as brotherhoods which have to do with the railroad

systems of the country. Mr. Garretson represents one, and I would like to have you hear him now.

**STATEMENT OF THEODORE MARBURG, OF BALTIMORE, MD.**

Mr. Chairman and gentlemen of the committee, my position before you is a modest one. I am not the representative of labor, I am not the representative of any business organization. I am not engaged in business. The people at the head of the Civic Federation have been rash enough to ask me to address them from time to time throughout some years, under the impression that a considerable study of public questions in this country and abroad gave the opinion of a moderately orderly mind some value. So my position here is a detached one, which relieves me from the charge of special pleading.

The CHAIRMAN. What is your business, Mr. Marburg?

Mr. MARBURG. I have none, sir.

The CHAIRMAN. I suppose you do not mean by that that you have no visible means of support; but have you any profession?

Mr. MARBURG. The term "publicist," rather erroneously used in this country, applies to me. The proper use of that word is a man who publishes works on law. That is not my profession. It is the study of political science and public questions. I define my position because I feel that the members of a committee always want to know the basis on which one appears before them.

Now, gentlemen, the principle of this bill, as I take it, is one of regulation as against ruin. Let me consider what I mean by that latter word. What is the condition around us to-day? We find a number of financial institutions ruined, we find railroads with such a reduction in their receipts as to be unable to make needed improvements—to put two tracks where there is one; to put four tracks where there are two, as they should do to-day; to multiply their cars; to improve terminal facilities—to abolish grade crossings as they should do everywhere, and use electricity in passing through our big cities. We find industry depressed; we find the laboring man out of employment, unable to feed his family. Now, that condition is rather peculiar to this country. There is a financial strain in other countries, but this condition of depression and of actual financial crisis is peculiar to us, who are one of the richest countries in the world, both in point of natural resources and in point of ability.

What is the explanation? I am afraid we will have to turn to our laws for it. The fine upon the Standard Oil Company was a serious element in bringing this about. The heads of those big corporations have frequently been charged with being knaves. They have not very often been charged with being fools. Is it reasonable to suppose that if that fine had been a fraction of what it was and the court had indicated what the maximum fine under all the counts might have been, had indicated its power to ruin the company, if need be, those men would not have ceased violating the law, if they were violating the law. I take it that the object of modern law is remedial; that it is to correct and prevent abuses. It is not retributive, it is not revengeful. And that fine, being largely in the nature of revenge, was one of the big elements in bringing on this crisis.

Mr. STERLING. I have heard that assertion made a good many times. Would you give us your views about how that is connected with the panic that started in New York City?

Mr. MARBURG. If you will permit me, I will state the other causes first. I believe the other item to be the mistaken attitude of the public, as expressed through both the Federal Government and the State governments, against the railroads. What we needed was improvement of service, which I have tried to define. There was very little reason to complain of actual charges. The misconduct of corporations is a source of just complaint, but the question of excessive rates was not a serious question before the public. Now, what have we done? Instead of in a new country like this giving railroads a good profit and insisting upon a proper use of the profit—to lay two tracks where there is one and four tracks where there are two, give us good terminal facilities, and plenty of rolling stock—what have we done? We have taken away their profits and simply postponed remotely the day of these possible improvements.

Mr. ALEXANDER. Are you speaking now of the real physical value or of the bonds and stocks value?

Mr. MARBURG. I am speaking of the way we have curtailed the earning power of the railways, which prevents the railways from making use of profits to make improvements, and disturbs public confidence to such an extent that railways are unable to borrow on new securities, which they otherwise might float in order to make improvements.

The CHAIRMAN. What particular legislation is subject to the criticism you now make?

Mr. MARBURG. I want to connect, incidentally, this bill with all this later on. For a moment I will ask you to indulge me in endeavoring to define the general causes of our present condition. I take the first cause of that to be the law which gives to the Interstate Commerce Commission the power actually to fix rates. I believe the sentiment of this country is wholly in favor of controlling the conduct of corporations. But in our present condition in a country which needs so much further development the railways, to my mind, might have been left profitable, speculatively, if you will, for another generation. It is a question of public expediency. I have had recently sent to me a table of the market price and the dividends of the nine leading railways of England through a period of ten years.<sup>a</sup>

What do they show? They show a falling off of about 30 per cent of the market price, and they show a corresponding decline in dividends. What is that due to? It is due to the action of a body with powers exactly like those conferred upon our Interstate Commerce Commission, the Board of Trade of England. They will not permit the railways to earn money. When the power to fix rates is in the hands of a small body of men, and the cry comes up continuously from all over the country, as it will, for lower rates, because people, if they have the power to regulate prices, are never satisfied and will always want them lower—if the plea comes continuously to a small body of men, they are of unusual fortitude if they succeed in resisting it. I cite the case of England because the board of trade is a body of practical men in one of the most conservative countries of

<sup>a</sup> See p. 81.

the world, and if that has been the result in England, what can you look for from the powers given to our Interstate Commerce Commission amongst a people whom I am sorry to characterize as emotional?

Now, Mr. Chairman, I want to say that the action of the Interstate Commerce Commission under its power has been very conservative during the past year. It is the attack of the States, led on by the Federal example, which has caused the ruin of so many of the railways. My point against the powers given to the Interstate Commerce Commission is that in the long run that is the more dangerous element in the situation to-day—not the attitude of the States, because that, as before, may be only a wave which will pass away. We saw it in the nineties, when it ruined a great proportion of the railways. But this power lodged in the hands of a few men of the Federal Government, with demands coming from Michigan, from the State of Washington, from Maine, from every section of the country, to lower the rates, is a menace.

Mr. ALEXANDER. Are you ready to answer the question of Mr. Littlefield now?

The CHAIRMAN. He is getting around to that.

Mr. MARBURG. My answer to the question as to how this legislation and this practice of the Government connects itself with the depression is that this tremendous fall in railway values, which, if you will look at the list you will find in some cases is a quarter of what it was—take a stock like the Southern Railway preferred, which could not be classed as a gilt-edge security, but was regarded as a safe investment; many people of small means invested in it. You have that railway stock, which was quoted at 100 two years ago, quoted at 25 within the last two months. Now, I say that undermines public confidence. The railways constitute an investment which is scattered throughout the people of the United States. When you add to that such a startling fine, such an unnecessary and revengeful fine as that upon the Standard Oil Company, those two things together, to my mind, are one of the great causes of the panic.

There are other causes. The strain upon the world's money by our own tremendous enterprises and the enterprise of the rest of the world—that is a cause for which there is no remedy, because the moment we try to invent a money out of something which is not limited by nature, like the money metal, gold, as a basis of the world's money, we invite trouble. A further cause of the crisis was the lack of elasticity in our own currency, and this is a situation which I hope the Aldrich bill will correct.

The CHAIRMAN. You are in favor of the Aldrich bill?

Mr. MARBURG. Yes, sir.

The CHAIRMAN. You do not look with favor on Mr. Fowler's proposition?

Mr. MARBURG. I do not. So long as you ask the question, the philosophy of that problem lies in the tax. If that tax is sufficient, two things will happen: The currency will be retired in orderly times, so that you will have an element of elasticity in extraordinary times. Second, if the tax is high, then this currency will not be issued until the general rate of interest is high; that is, until gold is drawn to the country, and the moment that rate of interest de-



clines the currency will be withdrawn, so that you will not interfere with the importations of gold. In other words, nothing but a high tax is going to prevent expansion and unsound monetary legislation.

Mr. ALEXANDER. How about the New York banks getting hold of all the securities required as the basis of currency issues under the Aldrich bill?

Mr. MALBY. I suggest that we proceed with the hearing on the bill under consideration.

Mr. MARBURG. I should like to answer that question, if you will permit me. To my mind it was a great mistake to withdraw the railway bonds from securities which could be deposited for additional currency under the Aldrich bill. If the people wanted to continue this crazy policy of attack upon the railways, the fact of including those bonds would have given us a better market for railway bonds, which would have meant issuing bonds at a lower rate of interest; that is, lower fixed charges on railways, and lower fixed charges would have meant either the possibility of cheapening service or making improvements. Therefore, from whatever standpoint you look at it, whether in order to benefit the service or to cheapen the service, there would be every advantage in including railway bonds. To my mind, throwing them out was simply an example of giving way to this inane hostility against the railways.

Now, Mr. Chairman, I have endeavored to show that the causes are manifold that have brought about our present condition. They are not all attributable to the Sherman antitrust law; but this Hepburn act is one of the steps in the way of remedy. I think we have generally accepted the position that the proper course is regulation as against ruin. We have been talking a lot about that. Have we done a single thing toward it? Now, this is, gentlemen, a step in that direction.

Mr. ALEXANDER. You have not answered the Chairman's question that you said you would do when you had concluded your postulate.

Mr. MARBURG. I thought I had.

Mr. ALEXANDER. Name the action of Congress which has led to the depreciation.

The CHAIRMAN. The question was, What specific act of legislation was subject to the criticism he was then making?

Mr. MALBY. He said, fixing the rates.

Mr. MARBURG. The law which conferred upon the Interstate Commerce Commission the power to actually fix rates. I desire to say that the action of that body has been most conservative, but the example given by the Federal Government is largely responsible for the action of the States.

Mr. ALEXANDER. Then you lay it on the States, rather than on Congress?

Mr. MARBURG. I lay it on the States, largely led by the example of the Federal Government.

The CHAIRMAN. Well, the State legislation is being rapidly declared unconstitutional, as rapidly as they come to it, so that will be righted in time.

Mr. MARBURG. Now, Mr. Chairman, this bill provides for the correction of some of the evils. It provides two things. It provides for a modification of the law of 1887, the interstate commerce law,

so that the railways may be allowed to make reasonable agreements. I was told by the manager of one of our largest railroads the other day that the big railroads did not want to pool. That it was only of advantage to the little railways in dividing up business.

The CHAIRMAN. What are the railroads that do not want it?

Mr. MARBURG. The big railroads.

The CHAIRMAN. What are the names?

Mr. MARBURG. This was a private conversation.

The CHAIRMAN. I do not think I would use a private conversation to influence the committee without giving us the benefit of the gentleman's name.

Mr. MARBURG. I am sure he would not object to the use of that information, provided I did not give names. As to that you must accept the honesty of my statement. That is all.

Mr. ALEXANDER. Would you be in favor of the abolition of the rate law?

Mr. MARBURG. No; because I believe absolutely in very stringent control of all public services, but not at present in actually fixing rates.

The CHAIRMAN. Your idea is, that we have the right antidote for the pain, but that the medicine was applied at the wrong time?

Mr. MARBURG. Certainly; I would not deny the right of the state to control the charges of all public service utilities.

The CHAIRMAN. But it was applied at the wrong time?

Mr. MARBURG. A generation or so too soon. It is a question of expediency again, sir.

Mr. ALEXANDER. There was no panic threatened nor any depression in business at the time Congress acted on the rate legislation, was there?

Mr. MARBURG. No. The impression among thinking men was that that would bring about a depreciation of railway securities, and we have seen what has happened.

The CHAIRMAN. Of course the lesson to be drawn from that is to be extremely conservative about changing existing law, is it not?

Mr. MARBURG. I cited that case—

The CHAIRMAN. But that is a fair inference from your suggestion.

Mr. MARBURG. I should take that as a truism, sir.

The CHAIRMAN. Yes; that is a maxim.

Mr. MARBURG. This present bill modifies one other law. That is the law of 1890, known as the Sherman antitrust law, and it modifies it in very important respects. It exempts from the operation of the law, in so far as any proceedings by the United States shall lie, reasonable combination, strikes, and lockouts. Again, it provides that any person who shall be injured by an act coming under the prohibition of the Sherman law shall recover simple damages instead of threefold damages.

Mr. DAVENPORT this morning maintained that there was discrimination and injustice there. I should like to point out to you gentlemen that that section modifies a section of the original act, that it in no way changes the standing of the individual or of the corporation—that it simply reduces the damages.

Mr. DAVENPORT. That was precisely my point—that so far as the individual was concerned, as we could gather from the nature of the

act, it would not modify the original Sherman antitrust law. As to reasonable restraint of trade, that was to be forbidden by this act in case it injured any individuals.

Mr. MARBURG. I maintain, Mr. Chairman, this is not injustice, because the act provides that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

If he is injured, the combination is likely to be unreasonable; and therefore there is no reason for bringing the rights of the individual under the clause which provides exemption for reasonable combination. The cases will be very rare in which a man is likely to be injured so as to show damages under reasonable combination to the satisfaction of a judge or jury.

Now, gentlemen, the important provision of this act is that which provides registration. We are getting down now to what we have been talking about for some years. This act prescribes registration as a condition precedent to the enjoyment of the benefits of the present bill. This, to my mind, is the most valuable feature of this measure. It prescribes that the corporation in its application must set forth—I am quoting from the language of the bill—"such information concerning the organization of such corporation or association, its financial conditions, its contracts, and its corporate proceedings, as may be prescribed by general regulations from time to time to be made by the President pursuant to this act." And in a later section it states that the President shall prescribe what information thereafter shall be furnished by such corporations and associations so registered.

The CHAIRMAN. I would like to inquire whether it is your opinion that any action can be required which does not relate to interstate commerce. This bill I presume proceeds entirely under the commerce clause. Now, you have investigated these questions to some extent. In your opinion can any action be required that does not relate to interstate commerce?

Mr. MARBURG. I am afraid I am not sufficiently a lawyer to answer that question, because it might relate indirectly.

The CHAIRMAN. Did the court hold in the Knight case that was not sufficient?

Mr. MARBURG. I take it, Mr. Chairman, that will hardly be a practical question, for this reason, that this law is dealing with corporations doing interstate business.

The CHAIRMAN. Yes.

Mr. MARBURG. I know the Knight case. Manufacturing is not interstate commerce, but this corporation is supposed to be shipping its wares elsewhere, and it is very difficult to say which act specifically is interstate commerce and which is not.

The CHAIRMAN. That is an inherent difficulty in the subject-matter?

Mr. MARBURG. Yes.

The CHAIRMAN. Is it not incumbent upon us who have the responsibility of recommending legislation upon this subject to have at least

some idea of the character of the information to be disclosed in order that we may judge of the utility of the information? Of course if the information is not to be of any utility for any public purpose, it is hardly justified to require it to be filed, and without ascertaining the information required to be filed how can we require it?

Mr. Low. May I answer that question?

The CHAIRMAN. Just as you like.

Mr. Low. In one of the drafts of the bill it was proposed to insert the exact questions which could be asked, but that meant a long and intricate bill, and in that shape when we brought the bill to your notice and tried to secure its passage through Congress there would be all sorts of questions that would be suggested, and it seemed to be wiser to embody the plan actually embodied here and give the President power to make general regulations, because that is a well-known system of legislation. I think the entire civil-service system is based on such a clause, and I think the immigration service rests on such a clause. and I think the President will have to be trusted under this bill to keep his questions within the law.

The CHAIRMAN. Is it not important for us to at least have some comprehension of the kind of information that even the President himself can require to be disclosed in order that we may be able to judge as to whether or not the information is going to be of public utility? Of course it is a difficult proposition.

Mr. MARBURG. Possibly this would throw light on the subject: On page 2, lines 8, 9, 10, and 11, it says corporations shall file "a written statement setting forth such information concerning the organization of such corporation or association, its financial conditions, its contracts, and its corporate proceedings," etc. I hope that the word "contract" may be extended to contracts with labor so as to permit of compulsory investigation. We will get wholesale benefit from this law if such a liberal interpretation can be placed upon it, or if there were some specific amendment to the act so as to permit it.

The CHAIRMAN. Why don't the language "its contracts" include contracts of labor?

Mr. MARBURG. I would like to see such an interpretation placed upon it.

Mr. Low. I understand the President can ask for such information as is indicated in that part of the bill.

The CHAIRMAN. Your idea would be those are things part of interstate commerce and therefore properly inquired into?

Mr. Low. Yes, sir. This is the information that I think people are entitled to know, about organizations that do interstate commerce and appeal to the public for their support.

Mr. MARBURG. This seems to bring about a great many benefits in a negative way. That is, it suspends the operation of the Sherman law for corporations who will conform to the regulations to be laid down by the President. Under this clause here he can investigate the organization of such corporations—that is to say, whether it is one corporation or whether it is a combination. He can investigate its financial condition, so as to protect the public from losses.

Mr. ALEXANDER. Right there may I ask a question, not particularly germane, but one I would like to have you answer? Suppose you as the head of a corporation should file a statement and it should be pro-

nounced by the Commissioner of Corporations unreasonable. There is no pool. Now, suppose you as head of that corporation make another contract which might be doubly unreasonable and you go ahead and do business under it. Would you not be getting a reputation of being very fair? Or suppose you had filed one pronounced reasonable, and then immediately after the one you filed that was decided upon, you enter into another contract which is unreasonable and which you do not file. Would you not get the reputation of reasonable, and then, immediately after the one you filed that was doing a fair business, and at the same time be doing an unreasonable business? Do you think this will protect that? Of course, they would then have to come in and bring suit as now under the antitrust law.

Mr. MARBURG. My answer to that would be twofold. I think you have placed your finger upon a weakness in this bill when you call attention to the lack of provision for appeal to the court. That provision is made in a later section where it concerns taking away the privilege of a corporation that has already been registered. You find that they can appeal to the supreme court of the District of Columbia.

Mr. ALEXANDER. That is on page 3, line 8.

Mr. MARBURG. I think if the same provision were added in the later section so as to permit the same appeal when a specific contract is filed, I think, with you, that would be a benefit.

The CHAIRMAN. Have you ever thought about the legal proposition or propriety of appealing from the executive to the judiciary?

Mr. MARBURG. I know it is against the principle of the courts if left to the discretion of the court; but in this case it would be specifically provided by law.

The CHAIRMAN. But can Congress constitutionally provide that the judiciary can review the action of the executive branch?

Mr. LOW. I do not think they can, and I so stated this morning; I think that is a feature of the bill that will have to be taken into consideration.

The CHAIRMAN. I agree with you on that proposition.

Mr. MARBURG. Can they not constitutionally provide when a particular contract has been declared unreasonable that the matter can be tried; instead of making the decision of an executive officer final, make it only preliminary?

The CHAIRMAN. Then you do not accomplish much by the decision.

Mr. MARBURG. I want to say on that subject that if this position of appeal to the supreme court of the District of Columbia is well taken in the clause which provides for this appeal where the license of the corporation is withdrawn, surely it is legitimate to put it in the later clause.

The CHAIRMAN. Of course it is as patent to put it in one place as in another.

Mr. MARBURG. I should like to answer the second part of the gentlemen's question. His hypothetical case was that of a corporation making a reasonable contract, which contract is passed upon by this Bureau of Corporations, and immediately thereafter proceeding to make an unreasonable contract. Now, nothing will prevent a corporation from making a reasonable contract and thereafter making an unreasonable contract except the vigilance of the Bureau of Cor-

porations. It must be depended on to see that the law is observed. If the President has power to investigate the corporate proceedings of corporations, how far does it go? If that would extend to practices, it would give just the power that some of us have been pleading for for ten years—that is, the power to prevent the big corporation from using the reduction of price to club the life out of its competitor. If that practice could be investigated, investigation would correct it. We see how Garfield's investigation of railroad rates acted, how his mere pronouncement of the rates as unjust operated to correct those rates.

The CHAIRMAN. Garfield's investigation of railroad rates—I do not remember that he ever made such an investigation. Do you mean Garfield?

Mr. MARBURG. I mean Garfield's investigation—possibly in connection with the beef trust in Chicago. My memory may be at fault as to the case. But I will broaden the statement and say that investigations into illegal and unjust practices not only serve to correct the illegal practices but the unjust practices as well, and that without resort to proceedings in a court of law or even in a court of arbitration. That is the result of publicity.

The CHAIRMAN. They had a very extensive investigation of the beef trust.

Mr. MARBURG. That is what I have been referring to.

The CHAIRMAN. Is it your recollection that after that investigation the prices of beef went down or up? My recollection is they went up.

Mr. MARBURG. I can not answer that question. My point is that investigation resulting in publicity results in a correction of abuses without resorting to the courts or to arbitration. If it is a question of labor disputes a mere compulsory investigation tends to correct the evil. It seems to me the power of the President could be wisely extended under this act to an investigation of the methods of industrial corporations. I am not sufficiently of a lawyer to say whether it would come under this term "corporate proceedings."

The CHAIRMAN. Do you think we could investigate the methods of corporate organizations except so far as they related to interstate commerce? Do you think we could confer the power on anybody to investigate the methods of corporations engaged in interstate commerce so far as they related to State transactions?

Mr. MARBURG. The investigation I have in mind relates only to interstate.

The CHAIRMAN. Yes, I see; you would confine it to that.

Mr. MARBURG. But State lines have been broken down by the telephone, the telegraph, and the railroad, and there are very few big industries existing to-day whose operations are strictly confined to State limits. The problems of to-day are problems of interstate commerce. If the investigation could be extended to unfair methods we could open the door to potential competition. Then potential competition would become real competition, and only two forms of objectionable monopoly remain. Monopoly based on control of raw material, for which at present I see no remedy, a most difficult problem; the other, monopoly that comes from Government favor such as a patent or franchise. A third form of monopoly, the monopoly of excellence, based on lower prices or superior quality of product, can not be regarded as objectionable monopoly.

The CHAIRMAN. What kind of corporations are pressing for this legislation—large or small ones?

Mr. MARBURG. We had a conference, Mr. Chairman, in Chicago in October. Mr. Nicholas Murray Butler sounded the note of attack upon the Sherman antitrust law, as a law, which was seriously hampering—to put it mildly—American industries. That note was echoed by nearly all the important speakers at that conference, and by Mr. Low himself. To me it came as a revelation. I had no idea there was such widespread opinion upon this subject. But I take it that the gentlemen who were at that conference will agree with me that it was a dominant note of that conference. So I am answering your question by saying that the business sense of this country is in favor of the modification of the Sherman antitrust law.

The CHAIRMAN. That does not quite answer the question. You may not be in possession of information that enables you to answer it. I admit this to be true that you speak of, that gentlemen gathered together and reached this conclusion; but my question to you is if you know of the kind of corporations in this country that are pressing for this modification of the Sherman antitrust law—small ones or large ones. It may be that you do not know that any of them are.

Mr. MARBURG. I should say both the big ones, as represented individually and through associations, and little ones as represented here through associations, such as Mr. Sheflin and Mr. Small—

The CHAIRMAN. Those are not corporations at all, because a great many of those people are engaged in individual business. Those are retail druggists.

Mr. MARBURG. That is the character of the associations which represented small corporations I have in mind. I would say that the organizations represented at Chicago included boards of trade, labor organizations, and big and little corporations.

The CHAIRMAN. Did any of those people at that conference undertake to present the views of any corporation, large or small; if so, what?

Mr. MARBURG. No particular company. The views came from individuals. The individuals in many cases came from corporations, and the furniture dealers, the lumbermen, and the druggists all made this plea which Mr. Sheflin made this morning for the power to regulate by contract with their customers the price of their commodities. I want to say on that, that is a power which many of us are not at all in sympathy with; to my mind it is a dangerous power.

The CHAIRMAN. Personally you do not think we ought to give them that from your standpoint?

Mr. MARBURG. No, sir; for the reason that you never know—it is impossible to place a limit.

The CHAIRMAN. You don't know what they will do with it.

Mr. MARBURG. But I want to say this in connection with this bill, that that opinion in no ways modifies my support of this bill, and why? Because this simply provides that the Commissioner of Corporations shall exempt reasonable combinations from the operation of this law, and it depends upon him to decide whether it is a reasonable combination or not. To my mind the druggists combination was an unreasonable combination, and therefore Mr. Sheflin's plea would still be a vain plea in case this bill passes.

The CHAIRMAN. You have no idea of what he would call reasonable or unreasonable combination?

Mr. MARBURG. That point was raised this morning. To my mind it presents no great difficulty, because when it goes to the Commissioner of Corporations the reasonableness of a combination will be decided by specific facts—the acts of the corporation, the behavior of the organization toward its customers; whether there was discrimination; as to the question of prices; whether it is enjoying a monopoly and abusing that power of monopoly. All those things will determine the reasonableness of the corporation. That term "reasonable," I take it, is a very common term in statute law, because of the complexity of economic affairs and human affairs in general. If you tried to define every law specifically the net result will be injustice; there is something to be left to the discretion of the judge.

Mr. STERLING. In speaking of persons present at that conference you named some trades represented there. Were there any representatives of large manufacturing industries, like the Steel Company and the Standard Oil—any representatives of such companies?

Mr. LOW. May I ask for the privilege of filing a list of those who were there with the committee? I haven't it with me. I do not think any representatives of the corporations named were there.

Mr. STERLING. Were there any representatives of railroad companies?

Mr. LOW. Yes, sir; some.

Mr. STERLING. Any representatives of labor organizations?

Mr. LOW. Yes, sir. I think that that convention at Chicago represented really a cross-section of American public opinion. It was attended by delegates appointed by the governors of forty-two States in the Union.

Mr. STERLING. Any representatives of agriculturists there?

Mr. LOW. Yes, sir.

Mr. STERLING. Any grain dealers?

Mr. LOW. General Batchelder was there—men of all sorts. I think the unanimity of opinion as to the need for some amendment to the Sherman antitrust law was exceedingly impressive. That was expressed again and again; there was absolutely no difference of opinion about it among the people there.

The CHAIRMAN. Was there any unanimity as to what the amendment should be—what were the needs of the hour?

Mr. LOW. Only of the most general kind. Whether any considerable number of those would be in favor of this bill there is no way of answering. The bill has received a great deal of thought and has been gone over and over again very carefully. If we had the time we could find out whether they are in favor of it. I suppose that is one of the reasons for the hearing—to find out. So far as concerns the fact that some amendment was needed to the Sherman antitrust law the unanimity of opinion there in favor of that proposition was exceedingly impressive.

The CHAIRMAN. I thought a month or two months ago there was a general sentiment everywhere that there ought to be some financial legislation, but my observation since then is that hardly any two men or two banks or two associations had been able to agree yet as to what ought to be done.



Mr. Low. That is not to say that nothing should be done; it merely shows a very difficult question, and I dare say you will find this one one of the same sort. This bill, as I have said, has at least the merit of being a constructive proposition. If anything better can be offered, we are perfectly open minded.

Mr. MARBURG. My only excuse for saying what I am about to say, after Mr. Gompers's elaborate statement, is that just because I am detached and not representing labor this may come as a more impartial plea than the special pleading of a representative of labor. It relates to this labor clause in the bill. It says:

Nothing in said act approved July 2, 1890, or in this act is intended, nor shall any provision thereof hereafter be enforced, so as to interfere with or to restrict any right of employees to strike for any cause or to combine or to contract with each other or with employers for the purpose of peaceably obtaining from employers satisfactory terms for their labor or satisfactory conditions of employment.

Now, what does that mean? It means that this modification relates only to the Sherman antitrust law; that it in no way extends or limits the rights of labor under the common law nor any other statute law, whether Federal or State.

The CHAIRMAN. That we could not do if we tried to.

Mr. MARBURG. It means that they are to be permitted to combine and strike or permitted to combine and form trade agreements. Now, economists are a unit in feeling that the trade agreement is the most powerful single instrument for peace in the industrial world. It anticipates the trouble. There should certainly be nothing in the law to prohibit the trade agreement. We do not say that the present law prohibits trade agreements or prohibits the strike, but we see in this actual indictment of laboring men for striking the probability that it does.

The CHAIRMAN. Are you in favor of authorizing an interstate boycott?

Mr. MARBURG. No, sir; I am not in favor of an interstate boycott or any other kind of boycott. I think the boycott is seriously unjust. I advocate the strike as an extreme measure, because without it the labor unions would go to pieces, and with all of the very grave abuses of which the labor union has been guilty, their net result is a tremendous gain for civilization, because those men have brought about a great reduction of hours and a great increase of wages.

Mr. DAVENPORT. I want to ask Mr. Marburg a couple of questions. I listened with a great deal of interest to your exposition of what you hoped to accomplish by this bill in regard to railroad pooling arrangements, and you hope to accomplish it by the insertion of the word "unreasonable," permitting reasonable pooling arrangements. Now, are you aware that the Supreme Court of the United States has decided that every such arrangement, every agreement between public-utility corporations looking toward a restriction of competition, is per se unreasonable? Were you aware of that fact? That every conceivable arrangement looking toward a restriction of competition between public-service corporations is per se unreasonable.

Mr. MARBURG. I will have to consult the language of the bill.

The CHAIRMAN. It is not in the bill; it is independent of the bill.

Mr. MARBURG. What is the citation?

Mr. DAVENPORT. In the Trans-Missouri Traffic Association case, the opinion there cited by a majority of the court. Another thing: You want to cut out this evil of one great corporation clubbing another out of existence by excessive competition. Are you aware that the use of the word "unreasonable" would not prohibit any such thing as that; that the House of Lords has held that precisely that kind of conduct—the effort of a company to drive a competitor out of business for the purpose of getting control of the business and dictating prices—is not an unreasonable or unlawful proceeding at common law? I am speaking of the word exclusively in the sense in which it has been considered by the courts. Of course if you import into this act a word which has had an interpretation by the courts, you import that interpretation.

Mr. Low. That is excluded.

Mr. DAVENPORT. I would refer Mr. Low to the Mogul Steamship case (Appeal Cases, 1894), and in support of our proposition I would refer the committee to the case of the majority opinion in the Trans-Missouri Traffic Association, and I would ask Mr. Marburg whether or not it is a fact that the opinion of the gentlemen who drew this bill was that any such arrangements as are contemplated by you would be covered by it? We have not been favored with the public argument and discussion of these legal questions by the gentlemen who drew this bill.

The CHAIRMAN. As I understand it, the attorneys are to come along later.

Mr. DAVENPORT. Before or after the opponents?

The CHAIRMAN. Before, if you want to be heard after.

Mr. MARBURG. In answer to the question of the gentleman, I would say that in my opinion the big industrial corporations ought to come under the same rule as the public-service corporations; that they ought to be required to sell at one price—that is, with the view of preventing them from killing incipient competition. The bill does not provide for that, but it provides for publicity. And, to my mind, if the Bureau of Corporations brings out the fact that the steel corporation is selling steel at one price per ton to one customer and another price per ton to another customer, that that publicity will tend to correct the discrimination.

The CHAIRMAN. We will suspend now and take a recess until Monday morning at 10.30 o'clock.

Thereupon, at 5.10 o'clock p. m., the committee adjourned, to meet Monday, April 6, 1908, at 10.30 o'clock a. m.

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SUBCOMMITTEE No. 3, COMMITTEE ON THE JUDICIARY,  
HOUSE OF REPRESENTATIVES,  
*Washington, D. C., Monday, April 6, 1908.*

The subcommittee met at 10.30 o'clock a. m.

Present: Representative Littlefield, chairman of the subcommittee.

Present, also, a number of members of the full committee, and many gentlemen interested in the subject under consideration by the subcommittee.

The CHAIRMAN. It is half past 10, and there is just one member of the subcommittee here. I shall not request you to go on, Mr.

Low, unless you like, until the other members are here, but I want to call attention to the fact that I am here and you are here.

Mr. Low. We are here, Mr. Chairman.

The CHAIRMAN. It is altogether at your pleasure as to whether your next speaker shall proceed now or wait until the other members of the committee come in. The stenographer is here, but I will leave that entirely to your discretion.

Mr. Low. If it is agreeable to you, we should like to wait until the subcommittee is present, Mr. Chairman.

The CHAIRMAN. Certainly; that is perfectly agreeable. I simply call attention to the fact, and want the record to show who was here on the subcommittee, because I did not want to have the time of a lot of people taken without a full understanding as to who is taking it.

I will state that the chairman of the committee (Mr. Jenkins) is, as I understand it, in possession of quite an amount of material in the line of telegrams and letters by way of protest against the bill, which, when he furnishes them to me, I will put in and make part of the hearing, so that the whole thing may appear as a matter of record. I will state for the information of what few are present that these hearings will be printed up to date after to-day, so that you can have the possession of the printed hearings up to to-day.

(Representative Alexander thereupon entered the committee room.)

Mr. Low. Mr. Chairman, now that Mr. Alexander has come in, if you wish to go on with the hearing we are entirely ready to do so, sir.

The CHAIRMAN. We are all ready, then, if you are, Mr. Low.

(Mr. Malby and Mr. Henry, of the subcommittee, subsequently appeared and took their seats.)

#### STATEMENT OF JEREMIAH W. JENKS, ESQ., OF ITHACA, N. Y.

Mr. JENKS. Mr. Chairman and gentlemen, I should like, in the first place, if Mr. Low will permit, to modify slightly the statement that was made with reference to the drafters of the bill. It seems to have been the opinion of the chairman of the subcommittee and of other gentlemen present that the bill was specifically drafted and put into definite form by some one or two people. That is not the fact. It is true, of course, that Mr. Stetson and Mr. Morawetz took an active part in drafting the bill. It is also true that repeatedly, at conferences where six or eight or ten persons were present, the bill was read over in different forms, and everyone present suggested changes in words, changes in phraseology, new ideas to be incorporated, and so on. I have myself kept in touch with this matter all of the time. I have been present at most of the conferences. I am inclined to think that Mr. Low is responsible for as many of the ideas as any other individual. As regards the legal effect of the different points that have been brought up and discussed at various times, I felt at the last hearing that it was entirely proper and right for those who were opposing the bill to ask that there be some definite explanation given of the bill, and that the opinions of the members of the committee that drafted the bill be sought, so far as possible, as to the meaning and as to what the force of the bill would be.

Inasmuch as it is not practicable for the other men to be present this morning, I am entirely willing to do what I can in that regard.

I think I should say—and it is in part in self-defense and in part for the enlightenment of the committee—that I do not pretend to be a practicing lawyer. At the same time, I am not entirely unfamiliar with the laws regarding trusts and combinations. At the time that the Industrial Commission was at work it fell to my lot to compile the laws of this country and of some foreign countries on that subject and to compile and have digested all of the decisions that had been made up to that date.

Of course we all know that there are very decided differences of opinion as to the meaning of a court decision. For example, there were two suggestions made by Judge Davenport the other day as to the meaning of the Mogul Steamship Company case and of the Trans-Missouri case that seemed to me totally wrong and absolutely at variance with anything that would be reasonable and fair as an interpretation of those cases; so I do not expect that any opinion that I might have with reference to these matters will be accepted by all. At the same time, I think it would be well, even on a legal question, to have a statement of what the questions are. If questions are asked which I can not answer, I shall be perfectly frank in saying that I do not know. So far as I can I will answer perfectly frankly and openly about the matter. When I do not know, I will say so; but I will know what the question is, and a definite answer will be furnished the committee from the point of view of the subcommittee that drafted the bill at the earliest practicable moment if I can not answer the question now.

I should like to say, further, that so far as this committee that drafted the bill is concerned it does not represent any one interest at all. It represents all interests in the country, so far as we could arrange it. The bill was prepared in response, as has been said before by Mr. Low, to a series of resolutions that were passed at the trust conference in Chicago, where there were some hundreds of delegates present, representing all classes of interests in the community, representing the great corporations rather less than the ordinary business interests, but representing all so far as we knew. Moreover, I think I should say that in the drafting of the bill not merely those men who have been mentioned have been consulted. They have been the most active ones; but many others have been consulted. For example, I myself have consulted professors in Cornell University in the law school; I have consulted judges and lawyers outside, in order to get, as best we could, enlightenment. So far as I am aware, we have nothing whatever to conceal in the matter, and no desire whatever to press forward the interests of any one class in the community. It is the general public interest that we have in view.

Mr. ALEXANDER. Professor Jenks, may I ask you a question?

Mr. JENKS. Certainly.

Mr. ALEXANDER. In your inquiries, do you find, where you talk with this person and with that one, that you are getting what we lawyers call "curbstone" opinions, or do you find that you are getting, rather, answers which are the result of very profound consideration of the exact point at issue?

Mr. JENKS. Both. It depends upon the person whom I ask. For example, if I go to the dean of the law school in Cornell University and ask him what he thinks the specific effect of such a word would be, I expect a perfectly definite, clean-cut answer. If I take a copy

of the bill to a man who is a judge and ask him what he thinks of this provision and what its effect would be, I expect an answer from a man who knows far more about it than I do.

The CHAIRMAN. I will ask you, Professor, a question or two which will perhaps develop just exactly what the course of procedure has been in that line. I infer that you would like to have a suggestion or two as to some of these legal propositions by way of beginning your discussion?

Mr. JENKS. I should have not the slightest objection. My thought had been, Mr. Chairman, to take up the bill section by section, and, so far as possible, answer the questions that had already been raised, state what the committee thought with reference to the matter, and then let the questions come, if the committee liked.

The CHAIRMAN. Either way will suit us. I got the impression from what you said that you would like at the very outset to have some suggestions or inquiries made as to the effect of certain provisions.

Mr. JENKS. I think perhaps it would be better if we take it section by section.

The CHAIRMAN. I think so myself. So, go right along with the bill in your own way; and as you reach various phases of the bill, if any questions occur to me they will be asked at that time; or I will wait until you get through.

Mr. JENKS. At that time, I should think, would be better.

The CHAIRMAN. Very well. Then, take your own course.

Mr. JENKS (addressing Mr. Alexander). Did I answer your question fully? I started to say that sometimes the questions have been perfectly definite in consulting people. Sometimes, of course, they have been an attempt to get at the general public opinion with reference to the effect and need of legislation along this line. It depends upon the persons whom we consult.

In the committee itself, it is fair to say, the discussions were as definite as they could be. Of course they were often as to the legal effect of a point; often as to what the effect would be likely to be upon business; often as to what the probable action of the Government might be. We did not know; but we were in the same situation as members of this committee, I assume, about it. We did the best we could to get the answer that we felt the need for. And I think it is fair to say that throughout the whole discussion in the committee and in the subcommittee I did not find the first evidence of any one man who was attempting to further the interests of his business.

Mr. EMORY. Mr. Chairman, I do not want to interrupt the Professor—

Mr. JENKS. That is all right.

Mr. EMORY (continuing). But he has been kind enough to make a statement concerning the history of the bill; and I wanted to ask, simply for information, if I may, about what period of time was covered by the preparation of the bill itself—that is, as to the thirteen or fourteen drafts to which Mr. Low has alluded?

Mr. JENKS. Perhaps Mr. Low can answer that more definitely than I. I should say at least a month or six weeks.

Mr. Low. Nearly two months, I think. We presented the resolutions to the House at the end of January. From that time until this bill was presented they were at work upon the draft.

Mr. JENKS. It should perhaps be said still further that the members of the committee themselves have found that, with the multiplicity of opinions that came up, it has been essential, in order that we might get together and prepare any bill, for concessions to be made, as has to be the case in a legislative body. The bill is the result of various compromises, of course, as it stands, and is simply the best we could do under the circumstances; although I suppose there is no one member, perhaps, that would not be glad to have some change made somewhere. So it is not an insistence upon a specific form of a bill, but an insistence upon the general spirit of the bill and the interests of the public that the committee wishes to make.

Now, with regard to this first section:

SEC. 8. That any corporation or association affected by this act, but not subject to the act approved February fourth, eighteen hundred and eighty-seven, entitled "An act to regulate commerce," or the acts amendatory thereof or supplemental thereto, shall be entitled to the benefits and immunities in this act hereinafter given, if and when it shall register as herein provided, and shall comply with the requirements of this act, hereinafter set forth, but not otherwise.

Such registration, by a corporation or association for profit and having capital stock, may be effected by filing with the Commissioner of Corporations a written application therefor—

This is the important point—

together with a written statement setting forth such information concerning the organization of such corporation or association, its financial conditions, its contracts, and its corporate proceedings, as may be prescribed by general regulations from time to time to be made by the President pursuant to this act.

That part I will take up first. In the next section the power is given to the President to make, alter, and revoke from time to time, and in his discretion he is instructed to make, alter, and revoke regulations prescribing what facts shall be set forth.

The question was asked here repeatedly the other day as to what would be done along that line; what was to be accomplished on that line; and what questions the President would ask. No one, of course, knows definitely with reference to that matter. The situation is simply this: The committee itself felt that it was extremely desirable, and, moreover, under its instructions from the general conference of the National Civic Federation it felt that it was compelled to provide for publicity in some way. In the first instance it was thought that the best way to get the publicity wanted was to prescribe in the act itself just what answers should be given by the corporations that wished to register; and in some of the earlier drafts of the bill those specific provisions for publicity were included. Later on it was thought for two special reasons that it would be better, instead of prescribing just what should be filed in each specific case, to leave that to the discretion of the President.

The reasons were primarily these: In the first place it was certain that the bill was going to be more or less complicated and long and cumbersome, and that in the interests of simplicity it would be better to leave that provision definitely to the President or to his administrative officers instead of marking out the specific questions. At the same time I feel confident that the committee would be practically equally well satisfied if the provisions were in-

cluded in the bill itself. As I say, that was the first thought of the committee. Afterwards it was thought wise to change it, partly, as said, in the interests of simplicity, and, secondly, because we all know that business conditions are continually changing; and it might very well be that within five years it would be desirable to insert some new questions to elicit some new or more definite information; or it might be that some of the questions asked at first might in practice be found to be of no use, in which case they could be dropped out. And we thought that there was no reason to doubt that our present President, or any other President we are likely to have, would secure the information that would make for publicity along those lines.

Mr. ALEXANDER. Did you have before you at any time, Professor Jenks, an exhaustive statement of the information that you thought it would be desirable to have filed?

Mr. JENKS. We did, sir. I shall be glad to read that, if you like.

Mr. ALEXANDER. No; I do not care for it now.

Mr. JENKS. Or I shall be glad to put it on file with the committee. Perhaps I might indicate what that information was; because it seems to me that those questions which were suggested to us would be those that would be very likely to be suggested to the President along similar lines; and it will show, at any rate, the attitude of the committee, and I think the attitude of the committee is perhaps of some importance.

The CHAIRMAN. Professor, you might read those, having in mind at the same time this rule of law, laid down by the Supreme Court in the case of *Adair v. The United States* on January 27, 1908, in which they say:

Manifestly any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated.

I suppose that we would be confined to that, and I suppose the President would, also. So you may go on and give your details, and state whether all of them, in your judgment, have any substantial or real relation to interstate commerce, and if so, what and how; if they do not have, what and how. I suppose that is a thing you considered? Was it, or was it not?

Mr. JENKS. That was considered.

The CHAIRMAN. That is, the committee understood that we could not require a corporation, under any hypothesis of legislation, to file anything with any officer which did not have a real or substantial relation to or connection with interstate commerce.

Mr. JENKS. My memory is that the specific case that you have cited was cited in the committee.

The CHAIRMAN. Yes.

Mr. JENKS. And that matter was taken up.

The CHAIRMAN. Now, I should like to have you go on and explain each detail so far as you think it does have real and substantial connection with interstate commerce, so that we will have the whole thing right in a nutshell—that is, from your point of view.

Mr. JENKS. In the main, I think that can be answered in one general statement—that it was the opinion that in the case of the corpora-

tions that are actively engaged in interstate commerce, and that are themselves directly connected with interstate commerce, the construction of the corporation itself, its officers, its by-laws, and its whole method of doing business, would be so directly connected with interstate commerce that the President would have the right to ask, under the law (provided Congress should so instruct and empower him in a bill), questions as to its organization, as to the personnel of its officers, and so on. That is the general principle.

The CHAIRMAN. Right there, I should like to know how that is connected with interstate commerce.

Mr. JENKS. I should say, myself—of course here I must give simply my own personal opinion—

The CHAIRMAN. Yes; give us your own ideas.

Mr. JENKS. I should say, myself, that if the traffic manager, for example, of a railroad, issues specific instructions as to the rates that are to be charged for goods connected with interstate commerce, it is pertinent for the Government to know the name of that officer.

The CHAIRMAN. Oh, yes.

Mr. JENKS. I should say that in the case of a large manufacturing concern, a large part of whose goods are going into interstate commerce, and which itself is very likely engaged in interstate commerce (as many of them are), it is also pertinent for the Government to know who are the men in that corporation that are engaged in that work of interstate commerce, and so know what the business is that is interstate commerce.

The CHAIRMAN. In what way is that important? What use will be made of it? How does it affect interstate commerce? How does it facilitate interstate commerce if you have it, or how does it impede interstate commerce if you do not have it? I suppose that is the test; is it not?

Mr. JENKS. I think that is the test.

The CHAIRMAN. In order to have information here that we have the constitutional right to ask for, it must appear that the information will either facilitate interstate commerce in some real or substantial way, or that the absence of it impedes interstate commerce. Do I state it correctly? That is, do I state the test correctly?

Mr. JENKS. I think you state it not quite accurately, if you will permit me, Mr. Chairman.

The CHAIRMAN. Very well; put it in your own way, then.

Mr. JENKS. You state it, I think, quite accurately if you will add these words, "or is likely to."

The CHAIRMAN. I am confining myself to the language the court used. It may be that there is some misunderstanding about this language. Let us see if there is. The court does not say "is likely to." The court says "must have some real or substantial relation." Now, I note what you say about there being a misunderstanding about what the court says; but do you think there is any misunderstanding between you and myself as to that language, when the court says "must have some real or substantial relation to or connection with the commerce regulated?" Is there any opportunity for misunderstanding about that?

Mr. JENKS. I should think that there would be a decided opportunity for differences of opinion in applying that to specific cases.



The CHAIRMAN. Can there be any difference of understanding between you and myself, as intelligent men, as to what that language means? Does it mean "directly or indirectly," or does it mean "real and substantial?"

Mr. JENKS. It means "real and substantial."

The CHAIRMAN. I will ask you, then, to apply that test as you go on; or, when you reach something that you think would be indirectly connected with interstate commerce, you can refer to it in that way, so that we can see what, in your judgment, would be indirectly connected with it, and therefore would not come within this specific language.

Mr. JENKS. May I make a further suggestion as to a possible difference of opinion as to the meaning of the words "real and substantial?"

The CHAIRMAN. Surely.

Mr. JENKS. I was going to say still further that that same court, if my memory serves, in its decision in the Trans-Missouri case, called attention strongly to the fact that the power to violate the law by exercising the power of monopoly was in itself sufficient for it to act upon. And so it seems to me that under circumstances of that kind, when a corporation is engaged in interstate commerce, it is direct and important information with reference to the work of interstate commerce for an investigating body to know who the officers are.

The CHAIRMAN. But what I want to get at now is what use connected with interstate commerce the party informed can make of that information so as to in some way affect interstate commerce? I can understand how it is convenient to have it, but what I want to get at is, in your own mind, just exactly what connection that has with interstate commerce?

Mr. ALEXANDER. Ask him to take a concrete case and show us.

The CHAIRMAN. For illustration, what does it matter whether a corporation has five directors or three, or a president and five vice-presidents, so far as interstate commerce is concerned? That, perhaps, is an illustration. Or what difference does it make if John Jones and Brown and Smith are the directors, as distinguished from some other three men?

Mr. JENKS. It makes this difference: If Jones and Brown and Smith are the men that are responsible, very likely, for abuses under this interstate commerce act, it is directly pertinent that they are the officers that can be attacked by the Government.

The CHAIRMAN. That is, they are the parties to reach?

Mr. JENKS. They are the parties to reach.

Mr. MALBY. In other words, it is more important to know just who they are than as to the number?

Mr. JENKS. I should say so.

The CHAIRMAN. I suppose you would say, as a further reason, that if there were other corporations with the same men in the directory, then you would want the information as bearing upon a possible combination between the two?

Mr. JENKS. Exactly.

Mr. MALBY. You would know, in other words, whether these men were also the directors of other corporations doing similar business?

Mr. JENKS. Certainly; that is the point.

The CHAIRMAN. We shall be glad to have you take up your separate facts, each in your own way, as you go along.

Mr. JENKS. Let me say here that, of course, we have no means of knowing that these are just the questions that the President would ask. In case the President should feel a doubt about these questions, presumably he would omit some of them. These are simply the questions that have been suggested by us.

The CHAIRMAN. These are the questions that you would be willing to take the responsibility of inserting in the act?

Mr. JENKS. So far as my opinion goes.

The CHAIRMAN. Certainly; that is proper.

Mr. JENKS. Its name, State of incorporation (if incorporated), and location of principal office, together with a true copy of its charter or articles of incorporation (if incorporated), or of association, and a true copy of all special or private acts (if any) under which it is organized or constituted or continued, or a reference thereto, as published in the official laws of the State in which any such acts have been passed.

Second. The names of its officers, directors, and standing committees, if any, with residences.

Third. A complete copy of its by-laws. It is under the by-laws, of course, that it will commit these offenses or will carry on its business in the proper way.

If such corporation or association shall be one having a capital stock, its statement shall include the following additional data:

The nature of its business—that seems directly pertinent, if it is to be engaged in interstate commerce—a description of the different classes of its stock, if any—

The CHAIRMAN. I suppose we could not go any further than to insist on the nature of the business, so far as interstate commerce was concerned?

Mr. JENKS. Of course.

The CHAIRMAN. If it was engaged in State commerce, we could not require it to do that?

Mr. JENKS. It would simply be the nature of the business, so far as it touches interstate commerce.

The CHAIRMAN. That is, you recognize the propriety in the rule established in the Howard case, which is that we can not regulate corporations engaged in interstate commerce because they are engaged in interstate commerce, but we may regulate those corporations so far as they are in interstate commerce?

Mr. JENKS. So far as they are in interstate commerce.

The CHAIRMAN. I make the distinction plain, do I not?

Mr. JENKS. Perfectly clear—so far as they are in interstate commerce.

The CHAIRMAN. So that we would not have any right to get information as to the business of this corporation which it did outside of interstate commerce?

Mr. JENKS. I should say not.

The CHAIRMAN. So that the information would have to be limited to the business it was doing in interstate commerce?

Mr. JENKS. Or it would have to be something that would have a direct connection with that business.

The CHAIRMAN. It must be so direct as to be interstate commerce, must it not?

Mr. JENKS. If it was the commerce itself.

The CHAIRMAN. Certainly. That is, the connection must be so close as to make it interstate commerce itself in order to subject it to our power to regulate?

Mr. JENKS. If it is the act, yes. When I am speaking of the names of the officers, etc., I think that connection is direct enough.

The CHAIRMAN. Yes; I see.

Mr. JENKS. Further, I should say, a description of the different classes of its stock, if any, with respective amounts authorized and outstanding, and the terms, privileges, restrictions, and conditions of each class separately, and also a description of its funded debt, and the several issues thereof, and the respective amounts thereof issued and outstanding.

A statement of the amounts of its stock held by other corporations, specifying such corporations and the amounts held by them, respectively.

A statement of the amount of stock in other corporations held by it, stating the names of such corporations and the separate amounts of stock held therein.

A copy of the balance sheets and of the income account, and of all reports to stockholders of the corporation for the two preceding years.

Similar information as to any other corporation more than one-half of whose capital stock is held by it.

The CHAIRMAN. Those are all cognate matters?

Mr. JENKS. Yes. Then, further, a provision was suggested that annually a similar statement, except as regards matters that could not change, be made.

The CHAIRMAN. That is simply to keep the information current?

Mr. JENKS. Yes. My impression is that that covers practically the suggestions which were made by the committee.

The CHAIRMAN. I suppose under your interpretation of the law you could require them to file a statement as to what stock they might hold in corporations not engaged in interstate commerce, could you?

Mr. JENKS. In accordance with the suggestion that was made by the chairman a moment ago, that the interrelationships of the directors of the different corporations might indicate clearly the way in which these combinations were made in connection with their interstate commerce, I should think that would be pertinent.

The CHAIRMAN. You would think you could require them to state their ownership of a State corporation that was not engaged in interstate commerce?

Mr. JENKS. That was engaged in interstate commerce?

The CHAIRMAN. No; I say a State corporation not engaged in interstate commerce.

Mr. JENKS. Not a State corporation not engaged in interstate commerce.

The CHAIRMAN. That, you think, would be excluded?

Mr. JENKS. That, I think, would be excluded.

The CHAIRMAN. If, however, the corporation was engaged in interstate commerce, your suggestion would cover that?

Mr. JENKS. It seems to me it would cover that; yes, sir.

The CHAIRMAN. How do the preferred stock and the common stock and the bonds have any real or substantial relation to interstate commerce?

Mr. JENKS. So far as I understand the force of the Sherman Act, the second section of the Sherman Act has to do very strongly with the effort to monopolize and with monopolizing traffic. So far as the power to obtain a monopolistic control of interstate commerce is concerned, it depends very largely upon the size of a corporation, upon the way in which that corporation is organized legally, upon the way in which its stocks and bonds stand relatively the one to the other, and upon its relations with the other corporations which are engaged in similar lines of business. And it seems to me that under those circumstances the connection is direct enough so that we are warranted in getting that information in order to enable us to deal directly with the questions of interstate commerce that come up. For example, if we wish to take a specific illustration to indicate the general principles on which a matter of that kind would go, the management of a corporation depends practically—solely, we may say—upon the wishes and desires and powers of the holders of its stock. Unless the corporation goes into liquidation or into the hands of the receiver it does not depend upon the wishes and desires of the bondholders. So it seems to me that if it puts its capital in part in the form of bonds and in part in the form of stocks it is pertinent and important that we know what proportion is bonds and what proportion is stock, and practically where it stands.

The same thing holds in many instances—not in all instances—with reference to the preferred stock as compared with the common stock. In some corporations, as we know, the preferred stock does not have the power of voting and the common stock does. In others it is the other way. That is another reason why we should have the by-laws and why we should have the articles of association, in order that we may see and know and be able to prove at any time just how that business is carried on and who is responsible for it.

It might be, of course, that in specific cases there might not anything very important rest upon the relative amount of preferred and common stock. It might perfectly well be that in specific instances it would be the core of the matter, which would determine it.

The CHAIRMAN. When you get the statement as to the preferred and common stock in your return, of course that is an unrelated fact. That return by itself is unrelated so far as any other returns are concerned; and it has to be considered by itself, has it not? That is a fact, is it not?

Mr. JENKS. I should say not, sir.

The CHAIRMAN. Let me see—perhaps I do not understand the question I am asking, and perhaps you do not.

Mr. JENKS. Possibly I do not apprehend it; that is more likely.

The CHAIRMAN. If a corporation makes a return which shows how its preferred and common stock stand, the amount of it and the shares into which it is divided and the way in which it is held, that return, in and of itself, is unrelated to any other capital stock that is not included in the return. I think that is quite clear; is it not?

Mr. JENKS. So far as that one return goes, yes.

The CHAIRMAN. And unless you are able to show the relations with other capitalizations, how do you get your connection, then, with interstate commerce, on the theory you have just been stating?

Mr. JENKS. When you get your complete statement, then you have your relation with interstate commerce.

The CHAIRMAN. Yes; but how do you get the relation with other corporations that may not be referred to in the return? Take a corporation whose return does not disclose anything but its own capitalization. How do you get, on the face of that return, any relation to any other corporation?

Mr. JENKS. When you are making your general regulation so as to get these returns from all of the corporations, it is certainly a fair presumption, so fair that it is practically certain, that you are going to find these connections scattered all the way through your whole business structure, so far as the great corporations are concerned.

The CHAIRMAN. So, as I understand you, it may well be that the return itself will not disclose any connection with interstate commerce, but it may appear later on?

Mr. JENKS. It is possible.

The CHAIRMAN. Do you think a court would compel a corporation to file a return that on its face did not disclose any power of the court to compel it to be done, on the hypothesis that later, when other things were done by somebody else, then there might be disclosed a condition that would compel them to file it?

Mr. JENKS. I see your point. That is a perfectly good point. So far as this bill is concerned, and so far as the attitude of this committee is concerned, there is no compulsion whatever, and there is no thought of bringing any compulsion whatever, upon any corporation to register if it does not wish to do so.

The CHAIRMAN. Yes; but we have to discuss this matter, I think, on the theory that we are enacting legislation which will result in law, and will affect legal rights.

Mr. JENKS. Certainly.

The CHAIRMAN. And the test of those legal rights is whether they can be enforced or not. So that the test of the power is whether or not, under a given state of facts which might well exist, the power could be enforced and the act suggested could be compelled to be done. Is not that fair?

Mr. JENKS. I should say that is fair.

The CHAIRMAN. Then let us take the illustration that I gave you. Do you think that the court would compel that to be done?—because, of course, if we have any power to compel this return to be filed, or if there is any legal validity to this at all, we could create a condition that could compel it to be done. That is true, is it not?

Mr. JENKS. Under certain conditions.

The CHAIRMAN. Yes; under proper legislation. So that you get right down to the legal rights of the parties?

Mr. JENKS. Certainly.

The CHAIRMAN. So that in order to test the legality of this, you have to be in a position where the court would compel a corporation to file the return.

Mr. JENKS. Provided it meets the other conditions laid down in the law.

The CHAIRMAN. To be sure. Now, do you think the court could or would compel a corporation to file a return that on its face did not disclose any connection with interstate commerce, and would need to wait until some other returns were filed that might disclose such a connection, just on a hypothesis or a conjecture? Do you think the court would compel that?

Mr. JENKS. Let me answer your question in this way: If the law provides that a corporation may secure certain privileges by following certain rules that are laid down in the law, by registering under the conditions laid down in the law, and that otherwise it can not secure those privileges, the court, in my judgment, would unquestionably hold that if the corporation does accept the immunities and privileges, etc., that are provided in the law, it must meet those conditions.

The CHAIRMAN. Very true.

Mr. JENKS. That is all this bill provides.

The CHAIRMAN. But, if you will excuse me, you have entirely departed from the legal hypothesis contained in my question—I do not say intentionally, but you have absolutely and entirely departed from the legal hypothesis contained in the question.

Mr. JENKS. Certainly I did; and now I will answer it specifically.

The CHAIRMAN. Yes; if you will, that is just what I want.

Now, that test is the legal power. Of course I am not suggesting that this should be included in your bill; but it is the legal genesis of the proposition to which I am directing your attention for the purpose of testing it. On the hypothesis that I gave you, do you think that under such circumstances the court could compel a return to be filed?

Mr. JENKS. My own personal impression is, as I said (again speaking not as a judge or an expert lawyer), that that contention is entirely right.

The CHAIRMAN. That the court could not compel it?

Mr. JENKS. That the court could not compel it. Let me add, further, that that has nothing whatever to do with this bill.

The CHAIRMAN. Very well; that is your proposition, however?

Mr. JENKS. Yes, sir.

The CHAIRMAN. I will ask this further question: Is not that an essential element of the legal equation upon which your bill is really predicated—that is, does it not fairly test the legal right? Does not the hypothesis I gave you fairly test the legal right?

Mr. JENKS. I should say not, for this reason: That this bill provides that a corporation is to do certain things in order to get certain privileges; and the matter is left entirely voluntary with the corporation.

The CHAIRMAN. Oh, that is perfectly true.

Mr. JENKS. If the corporation submits itself by taking the immunities that are provided for (if you wish to use that expression), or by taking the privileges provided for, my judgment, on the other hand, is that the court would compel it to meet the conditions of the law.

The CHAIRMAN. While that might be true, still that would not make the return a part of interstate commerce, because that fact is tested by the hypothesis I have already given you.

Mr. JENKS. Oh, so far as that is concerned, that would not in itself make the return part of interstate commerce.

The CHAIRMAN. No. The mere fact that they undertook to get the benefit of some privileges or immunities by doing something that they are not required by law to do of course would not make those things necessarily lawfully or legally compellable. That is, I take it, your proposition.

Mr. JENKS. The point is this: If the corporation wishes to get these privileges, and the conditions under which those privileges can be secured are laid down in the law, even though those conditions are such that they do not touch interstate commerce, the corporation still must do that.

The CHAIRMAN. To be sure.

Mr. JENKS. It must meet those conditions?

The CHAIRMAN. That is to say, they can not get the immunity without complying with the conditions. That is obvious enough.

Mr. JENKS. Exactly. Let me say again that that is the central thought in this bill.

The CHAIRMAN. If that be the central thought in the bill, does the bill proceed on the hypothesis that it suggests immunity in consideration of which corporations must file information of various kinds, irrespective of whether it relates to interstate commerce or not?

Mr. JENKS. Part of it, I should say, need not be directly connected with interstate commerce.

The CHAIRMAN. What particular lawful purpose is served within the scope of the Federal legislation or the Federal power, by getting into the possession of any department of the Federal Government information that does not relate to interstate commerce? What legitimate use can they make of it? What legitimate use have they a right to make of it?

Mr. JENKS. That is very good.

Mr. LOW. Mr. Chairman, may I ask a question?

The CHAIRMAN. Certainly.

Mr. LOW. In the first place, the President is to lay down the regulations, and he will undoubtedly be advised as to what he can ask for and what he can not ask for and keep within the law.

The CHAIRMAN. That is, he will be advised by his attorneys?

Mr. LOW. He will be advised by his attorneys.

The CHAIRMAN. That is what we want to be advised by.

Mr. LOW. The other question I should like to ask is a business man's question. Any corporation doing interstate commerce which has stock of various kinds seeks the money of the public as investors for the purpose of doing interstate commerce. Is it not a perfectly legitimate thing to ask that corporation, if it wants to do interstate commerce on the basis of all sorts of stocks and bonds, for the benefit of the investor whose money is to be engaged in interstate commerce, to state the conditions upon which that money is to be used in interstate commerce?

The CHAIRMAN. That comes right down to the question as to whether, under our power to regulate commerce, we have any power to protect the investing public as a part of the regulation of commerce. I will ask Professor Jenks to tell us what he thinks about that. Under the power to regulate commerce have we any power to so regulate corporations as to protect the investing public? And if so, what connection has the security-investing public with interstate commerce?

Mr. JENKS. I am very glad Mr. Low spoke of that. I should say that under the power to regulate commerce the United States Government does have a perfect right to invite corporations that are engaged in interstate commerce to answer any questions that will serve the public welfare.

The CHAIRMAN. Oh, but that is not quite it, is it—"invite?"

Mr. JENKS. "Invite?" Certainly.

The CHAIRMAN. No; my question is: Do we have any power, under the power to regulate commerce, to so regulate it as to protect the security or value of the investing public's investments? Is that a part of our power to regulate commerce?

Mr. JENKS. I should say that it is part of your power to regulate commerce or to make any other law. I think it is entirely within your power, and I think, moreover, it is part of your duty, in passing laws to regulate interstate commerce or to do anything else, to keep in mind distinctly and fully the public welfare. If you can secure that welfare easily, and well, and legally, and properly by suggesting that in their reports they shall furnish certain information that will be of benefit to the investing public and to others, it is perfectly proper, and legal, and wise for you to do it.

The CHAIRMAN. In other words, it comes down to the proposition that we have power to take care of the solvency of a corporation engaged in interstate commerce for the protection of the investing public; does it not?

Mr. JENKS. It depends upon how you are going to take care of that solvency.

The CHAIRMAN. No matter about how—is not that what it comes down to?

Mr. JENKS. I do not think so, necessarily—not at all. You are not in any way directing the affairs of that corporation. You are asking the corporation to tell the public, to tell you, to tell the Government, what its financial condition is, provided it wishes to get these benefits. They can take their choice. It is a purely voluntary thing, and they can take their choice. If they wish to get these benefits which you are willing to concede to them under certain conditions, it is perfectly proper for you to make the condition one that will be of benefit to the investing public.

The CHAIRMAN. Is it your position that under the power to regulate commerce we have the power to say that no corporation shall engage in interstate commerce except upon such conditions as Congress shall impose, irrespective of whether those conditions do or do not relate to interstate commerce? Is not that practically what your position comes down to; and do you take that ground? I am not intimating that that is not a sound ground, or one way or the other.

Mr. JENKS. I was going to say that that question is a very clean-cut legal proposition. My own opinion on that matter is (but I should not feel like insisting upon it too strongly) that the courts have said that the power to regulate commerce is, in the hands of the Congress, practically unlimited.

The CHAIRMAN. Have you consulted the counsel that have been associated with you in the drafting of this bill? They are very eminent gentlemen.

Mr. JENKS. Not on that specific question.

The CHAIRMAN. It is a pretty important proposition, is it not?



Mr. JENKS. It is.

The CHAIRMAN. It comes pretty near going to the nub of the whole thing.

Mr. Low. We will consult not only them, but others, Mr. Chairman.

The CHAIRMAN. Will you please give us the benefit of you investigation?

Mr. Low. Certainly.

The CHAIRMAN. These are all-important questions.

Mr. Low. May I ask another question? (You will observe that my questions take the point of view of the business man rather than the lawyer.) Is it not certain that Congress has just as much control over interstate commerce as it has over national banks; and does not the Congress undertake, by supervision, to protect the investor in national banks and by other regulation; and can it not, by a parallel course of reasoning, do the same thing for interstate commerce and those investing in it?

The CHAIRMAN. You have some very distinguished gentlemen advising you; and they can undertake to establish the parallel between national banks and the power to regulate commerce. Of course, I am not giving information on this subject, however; I am simply seeking it.

Mr. JENKS. I understand.

The CHAIRMAN. I should think it would bother them somewhat, however, to establish the analogy; because the national bank is the creature of the National Government, absolutely subject to its control in all of its functions and operations, and does not derive any power whatever from any source except from the National Government. I simply throw this out as a suggestion. It receives a charter from the National Government; and what we authorize it to do we can authorize it to do under any kind of conditions that we see fit. But the regulation of commerce is not exactly vested in us by an act of Congress, but by the Constitution itself.

Mr. JENKS. Yes; by a still higher power.

The CHAIRMAN. And one difficulty about this other proposition is that the courts have held in the most recent case that we can not regulate people because they are engaged in interstate commerce, but we can only regulate people engaged in interstate commerce in the doing of interstate commerce. That is what has been expressly held during the last forty-eight days. That is the embarrassment you may reach in connection with that matter.

Mr. JENKS. If I recall aright, Mr. Chairman, the courts have held that it is within the power of Congress to refrain from interfering in interstate commerce along certain lines if it wishes to do so, or to restrict interstate commerce, so far as I recall, without any specific limitation as to its power to restrict it—practically to prescribe the conditions under which any corporation shall engage in interstate commerce.

The CHAIRMAN. You think some case has held that—that they can prescribe the conditions, irrespective of whether or not the conditions relate to interstate commerce or to State commerce, as conditions upon which corporations can engage in interstate commerce? If you have a case that establishes that proposition, you can call our attention to it, and we can examine it.

Mr. JENKS. I was going to say that my understanding is that there are certain cases that practically take that position—that it is within the discretion of Congress to determine the conditions under which interstate commerce shall be carried on by any individual or corporation. I shall be glad to see if I can not submit a case that will touch that point.

The CHAIRMAN. I wish you would. I have entertained more or less of that view heretofore; but I have been obliged to surrender more or less of it on account of the recent decisions. Now, go right along.

Mr. JENKS. May I ask if there are other questions to be asked under this general head of publicity?

The CHAIRMAN. Have you given all the details that you care to give, now, Professor, as indicating the scope that you think that the returns should take?

Mr. JENKS. These were the suggestions that were made, and I think I covered practically all of them. I can run over them again in a moment.

The CHAIRMAN. Yes.

Mr. JENKS (reading):

Its name, State of incorporation (if incorporated), and location of principal office, together with a true copy of its charter or articles of incorporation (if incorporated), or of association, and a true copy of all special or private acts (if any) under which it is organized or constituted or continued, or a reference thereto, as published in the official laws of the State in which any such acts have been passed.

The names of its officers, directors, and standing committees, if any, with residences.

A complete copy of its by-laws.

If such corporation or association shall be one having a capital stock, its statement shall include the following additional data:

The nature of its business.

A description of the different classes of its stock, if any, with respective amounts authorized and outstanding, and the terms, privileges, restrictions, and conditions of each class separately, and also a description of its funded debt, and the several issues thereof, and the respective amounts thereof issued and outstanding.

A statement of the amounts of its stock held by other corporations, specifying such corporations, and the amounts held by them, respectively.

A statement of the amount of stock in other corporations held by it, stating the names of such corporations and the separate amounts of stock held therein.

A copy of the balance sheets and of the income account and of all reports to stockholders of the corporation for the two preceding years.

Similar information as to any other corporation more than one-half of whose capital stock is held by it.

The CHAIRMAN. May I ask one question right there? What does the report to the stockholders for the two preceding years have to do with interstate commerce? I simply make that as a suggestion. What connection does it have?

Mr. JENKS. I think I should reply to that just as I replied before, with respect to a matter of that kind—that it is of the greatest importance in determining the nature of the corporation's work that we shall see how that work is carried on in detail. There is no other way in which we can find that as fully and easily as we can in that way.

The CHAIRMAN. So far as I can judge, the information that you have suggested is everything that a State legislature could require of a corporation chartered by the State. Is it your conception of the

legal situation that Congress has the same power with reference to requiring reports from corporations engaged in interstate commerce that a State has in relation to a State corporation that it charters?

Mr. JENKS. No; I think not; but I think there is this distinction that should be made in connection with what I have just said, and that is that Congress, in my judgment, does have the power to prescribe the conditions. You will remember that this is not a compulsory thing. This is a permissive thing. It simply says: "If you, the corporation, wish to do this interstate commerce"—and they are not restricting it to that, either—"and wish, furthermore, to get special privileges that we are willing to grant under certain conditions, you may have those privileges if you willingly come and give us this information."

Mr. ALEXANDER. In other words, "if you want to escape the Sherman antitrust act?"

Mr. JENKS. "If you want to escape the Sherman antitrust act, in part, at any rate, come and give us this information and you may. But if you prefer, instead of giving us that information, to take the penalties and evils of the Sherman antitrust act, which has been held constitutional, unreasonable although the court says it is in certain particulars, you may do so."

Mr. ALEXANDER. "If you want to make pooling arrangements, file them and we will ascertain whether it is proper for you to pool and not get caught under the Sherman antitrust act." Is not that your idea?

Mr. Low. That is the idea.

Mr. JENKS. Yes; if I understand your question, I think that is just the idea. "If you want to pool and will give us full information about your pooling, so as to let us see whether it is a reasonable pool or not, you may do so, provided, in our judgment, it is reasonable."

The CHAIRMAN. That, of course, is an interstate-commerce pool?

Mr. JENKS. An interstate-commerce pool.

The CHAIRMAN. Of course, the Commissioner of Corporations could not have any opinion at all unless he had the full information; so that question answers itself. But do you think that we ought to impose immunity on the hypothesis that as a consideration for it we are giving constitutional or unconstitutional information?

Mr. JENKS. If you will pardon me, Mr. Chairman, I do not think that is a fair question.

The CHAIRMAN. Well, I understood you to concede that some of these details that you refer to were details that could not be required under the commerce clause.

Mr. JENKS. But that does not make them unconstitutional, Mr. Chairman. It may very well be that—

The CHAIRMAN. I am speaking upon the basis of being able to constitutionally require them.

Mr. JENKS. That is a different think. If you put it in that way, I will say yes.

The CHAIRMAN. Is there not such a thing as a Federal power?

Mr. JENKS. Certainly.

The CHAIRMAN. Is there not such a thing as a Federal purpose?

Mr. JENKS. Certainly.

The CHAIRMAN. Do you think the Federal Government has any business either to legislate or to administer legislation except in the execution of a Federal power?

Mr. JENKS. I do not.

The CHAIRMAN. Then, what business has it with information that does not relate to the execution of a Federal power?

Mr. JENKS. None.

The CHAIRMAN. But that is the kind of information you want to be prepared to get, is it not?

Mr. JENKS. I beg your pardon; that is where I differ. I think it is a Federal power to secure the general welfare of the public, as much as it is to regulate interstate commerce.

The CHAIRMAN. Then, you fall back on the "general welfare" clause?

Mr. JENKS. I would, for that specific thing.

The CHAIRMAN. That settles it, then.

Mr. JENKS. It seems to me it comes up in this way: In my judgment (which is subject to possible correction, of course) it is entirely within the power of Congress to prescribe certain conditions under which corporations may secure the benefits of this act. Those conditions may not be, of course, unconstitutional conditions, but they may be conditions that are perfectly legal and proper and within the public welfare, though not directly connected with interstate commerce.

The CHAIRMAN. Is it your idea that we can do almost anything that is necessary to promote what you would call the general welfare—appropriate money and enact legislation?

Mr. JENKS. Why, you certainly do appropriate a great deal of money and enact a great deal of legislation for the general welfare.

The CHAIRMAN. I am asking you as a constitutional lawyer.

Mr. JENKS. I hardly like to take to myself the name of a constitutional lawyer.

The CHAIRMAN. Well, as a layman, then?

Mr. JENKS. But I should say that you very wisely do appropriate much money for the interests of the public welfare, and you have a perfect constitutional right to do it.

The CHAIRMAN. You think we have?

Mr. JENKS. Oh, certainly.

The CHAIRMAN. You think that anything that in the judgment of the legislature promotes the public welfare is a legitimate subject of appropriation; and if it is a legitimate subject of appropriation, why is it not a legitimate subject of legislation?

Mr. JENKS. Unless it is specifically forbidden in other respects.

The CHAIRMAN. Yes; but unless there is some specific provision of the Constitution prohibiting an appropriation, we can appropriate for any purpose; and if we can appropriate for that purpose, we can legislate for the same purpose?

Mr. JENKS. I do not think I should put the matter quite so strongly as that. Of course, I am aware that the Constitution is a constitution that is of specific grants; but, at the same time, the grant as to the public welfare we know, under the interpretation of our court, has a very wide application; and just where the line can be drawn it certainly would not do for one, offhand, to say.

The CHAIRMAN. I wish you would put into the record a case where the courts have relied on the "general welfare" clause to enlarge the enumerated powers, either by way of appropriation or by way of legislation. I suppose you and I agree that this Federal Government is a government based upon enumerated powers?

Mr. JENKS. Yes. At the same time I think the later interpretation of the public welfare clause has been to extend it far beyond what people before had thought it covered.

The CHAIRMAN. I wish you and your attorneys would put in the record (because I am interested in that for another reason) a case that will show that the court relied upon the "general welfare" clause to enlarge the construction of the enumerated powers. I do not care whether it is contemporaneous or what case it is; I would simply like to see where there is a case where they have invoked the general-welfare clause for the purpose of enlarging the operation of any enumerated powers, or "powers plainly adapted to the end." That is the language of the old Gibbon and Robbins case.

Mr. JENKS. It was the Gibbons case I had in mind.

Mr. Low. May I ask a question?

The CHAIRMAN. Certainly.

Mr. Low. I hold in my hand a bill, House bill No. 2, introduced by Mr. Littlefield December 4, 1905, in which, among the questions to be asked interstate-commerce companies were the amount of bonds issued and outstanding, the amount of authorized capital stock, the shares into which it is divided, the par value, whether common or preferred, the dividend upon each, and so forth; and the report of the Judiciary Committee—

The CHAIRMAN. Made by me also.

Mr. Low (continuing). Favorably upon that bill, which shows that at that date yourself and the Judiciary Committee held the view that we have held in preparing this bill.

The CHAIRMAN. You are quite correct; but let the chairman state this, if you please.

Mr. Low. I was going to ask the chairman a question.

The CHAIRMAN. Yes.

Mr. Low. I wanted to know whether the doubt that is now in your mind is the result of this Adair decision, more recently than what had taken place then?

The CHAIRMAN. Not the Adair decision, but the decision in the Howard case. I did entertain the view at that time that we could ask a corporation to do almost anything. But since the Supreme Court, in the Howard case, have expressly held that you can not regulate corporations because they are engaged in interstate commerce, but only as to the things that relate to interstate commerce, I have very grave doubt, because the court have announced that entirely new and clean-cut proposition. You are perfectly correct about that. That bill is pending now. But with the light that is shed by the Howard case, it will not be pressed by the chairman of the committee. Does that make my position plain?

Mr. Low. The chairman of the committee will understand that we are not very much to be blamed for holding the views which he himself and the Judiciary Committee have so recently given expression to.

The CHAIRMAN. There is not a thing that the chairman has suggested that indicates that anybody is to blame. The chairman is simply looking for information.

Mr. MALBY. I think the chairman introduced the same bill this winter.

The CHAIRMAN. I said I had, and it is pending now.

Mr. WASHBURN. May I ask one question?

The CHAIRMAN. Yes.

Mr. WASHBURN. Many of the manufacturers of this country are organized into trade agreements relating to the buying and selling of the commodities with which they deal, and are forming combinations from time to time that are held to be in contravention of the Sherman Act as it is now construed. Inasmuch as these combinations are the only agreements which are affected by the Sherman antitrust act, I should like to ask, as a practical matter, why it is important that any individual corporation should file the statement which is called for in section 8? In other words, why should the Commissioner of Corporations, or the official charged with determining whether these contracts are reasonable or unreasonable, care anything about the particular condition of the different corporations engaged or involved in this combination?

Mr. JENKS. If I understand your question, so far as most of those associations are concerned that you are speaking about, they are voluntary associations without a capital stock.

Mr. WASHBURN. No; I am talking about combinations between corporations scattered all over this country, touching some particular article of commerce. My question is, why it is important to inquire into the individual financial condition of each one of these corporations, when the only act of theirs on which the Sherman Act can operate is the combination itself?

Mr. JENKS. So far as those special corporations are concerned in that connection, if their contract is one that they wish to secure immunity from, of course that information must be filed; otherwise not. So far as the specific question goes, I should say that in a great many instances, especially in the case of the smaller corporations, it is not important, either one way or the other. But I imagine that a great many of them would prefer to come in under the act and file that information, in order that there might be no question as to the legality of their act in making this contract. But on the other hand, it may also very well be that these corporations are such that by virtue of this agreement they are acquiring a monopolistic power, and under those circumstances it is of extreme importance, because they are getting that monopolistic power, and how they are exercising it.

Mr. STERLING. Professor, the chairman asked me a question ago, if in your opinion, you thought the power of the Federal Government over interstate commerce was as full and complete as the power of the State legislatures over intra-state commerce. I understood you to answer that in the negative?

Mr. JENKS. I did not understand the question to be that way. It was rather this, as I understood it, Mr. Sterling.

The CHAIRMAN. The question was whether or not the power given to regulate corporations engaged in interstate commerce is sufficient

went so far as the power of the State to regulate the corporation of its creation?

Mr. JENKS. Yes; that was as I understood the question.

Mr. STERLING. Has not the Supreme Court said, in so many words, that the power of Congress to regulate corporations or persons engaged in interstate commerce was as full and complete as the power of the State legislatures over corporations engaged in intrastate commerce? Did they not use substantially that language?

Mr. JENKS. I was not aware of that. If so, I am glad to hear it.

Mr. STERLING. I think they have.

Mr. JENKS. But not in just the way that you put it.

Mr. STERLING. They have said this, I am sure—that the power of Congress over interstate commerce is full and complete.

Mr. JENKS. That is right; that is what I contended before.

Mr. STERLING. If that be true, can there be any serious question, then, about the Federal Government having power to impose any condition on interstate corporations that will enable it to intelligently regulate the commerce in which they are engaged?

Mr. JENKS. That was the contention that I myself was making, exactly as you are stating it; but it is a little bit different from saying that the Congress has the same power over interstate commerce and over corporations that may be engaged in interstate commerce that the States legislatures have over corporations engaged in intrastate commerce; and it was the distinction that I understood the chairman was making. I myself intended to take, and I thought did take, exactly your position—that Congress could practically impose any conditions it pleased in reference to the regulation of interstate commerce; but not necessarily that it had the same power over corporations engaged in interstate commerce that the State had which itself created those corporations.

Mr. STERLING. I of course intended to limit it to the power of Congress over corporations by way of regulating the interstate commerce in which they are engaged.

Mr. JENKS. As far as it is necessary to regulate it, I should say that that is exactly the position I was taking. So far as I see the position you are stating now, it is exactly the position I intended to take and did take.

Mr. MALBY. Professor, there can not be any question but that in the case of a corporation which is created by a State itself, receiving its corporate existence and receiving all its rights and privileges from the State itself, that State may require from that corporation any kind of a report it pleases.

Mr. JENKS. Certainly.

Mr. MALBY. But the distinction between that case and the one in which the corporation is engaged in interstate commerce, where the charter in every case is granted by a statute, is that our inquiry, under the decisions of the Supreme Court, is limited to those acts which go exclusively to the interstate commerce.

Mr. JENKS. Provided you are compelling it. If, on the other hand, you wish to say: "If you will give us this still further information that we perhaps would not have the power to compel you to give, we will grant you certain other immunities and privileges," I conceive that you have the right to accept that.

Mr. MALBY. The precise question is as to whether we can compel, by indirection, a corporation to furnish information which we could not compel it to furnish by direction. That is a very grave question in my mind. For instance, it would be my opinion that you can not say to a corporation, "You must furnish information which is not directly connected with interstate commerce in order to be entitled to the rights and privileges of an act of Congress."

Mr. JENKS. I am very glad you raised that question here, because it seems to me that it is extremely important.

Mr. MALBY. It is important; it is very important.

Mr. JENKS. And I think the distinction should be kept clearly in mind. I believe that Congress does have a right to secure the public welfare, which in this case would be the securing of the information by offering certain privileges to those who wish to accept them. Let me take an illustration on that point which is along a somewhat different line. We know that the States, the Federal Government, municipalities, all of them, say repeatedly to corporations and individuals: "You may engage in business of a certain kind provided you will do certain things. If you like, you may engage in the selling of retail liquor, provided you will pay a license fee of a certain amount; otherwise you can not." That is a power that exists in many cases under State law. Of course in municipalities it exists regularly, and in the United States it exists under the Federal Government. I do not know what the conditions may happen to be in the District of Columbia, but I imagine that you have a situation of that kind in the District of Columbia.

The CHAIRMAN. That is not a Federal proposition; that is a municipal proposition in the District of Columbia.

Mr. JENKS. It is within the power of the Federal Government to determine the conditions under which it may be done.

The CHAIRMAN. But, Professor, do you not recognize the distinction between the Federal power and the municipal power that Congress exercises over the District of Columbia?

Mr. JENKS. I do in this specific case; certainly.

The CHAIRMAN. Certainly.

Mr. JENKS. But the point I am making is this—that that is a very common and practically universal form of legislation in all States and under all conditions everywhere.

Mr. MALBY. Only to this extent, and by virtue of the fact that the right to sell liquor is obtained from the State itself under certain rules and regulations prescribed by the State, without which, of course, no person has the right to sell liquor. A corporation created by a State gets its powers, its authority to do business from the State. It is a creature of the State. Its powers may be extended, enlarged, or wiped out, because it is a creature of the State. Is that point I am trying to impress upon you that the corporation is a creature of the National Government itself?

The CHAIRMAN. Well, you do not want to go quite so far as that.

Mr. MALBY. I mean the corporation for state purposes only, for state purposes only.

The CHAIRMAN. Yes.

Mr. JENKS. Those that he is speaking of.



Mr. MALBY. They are creatures of the State; and they receive their authority to do business under some State law, and not under the National Government law. The only thing that we can do is to require a report that they have done something or omitted to do something by virtue of a provision of the Constitution regulating commerce between the States. Now, clearly we can not require them to do the things which a State could require of the same corporation, because our power is limited, under the Constitution, to interstate commerce. The point I desire to make is, so as to be understood, that we can not require, I should say offhand (at least, I invite a discussion of the subject), of a corporation doing an interstate commerce business, that it should make any report except as it may have reference to the interstate commerce. I also think that we can not grant them a privilege in a bill where we can not compel them to give the same information in a bill. That is the point I want to make.

Mr. JENKS. That is a different proposition.

Mr. ALEXANDER. That is the nub of the thing—that last sentence.

Mr. JENKS. It was to that second point that I was about to reply. Suppose we grant the first point—it does not necessarily, by any means, involve a granting of the second. So far as the type of legislation is concerned, it is very frequently the best form of legislation, in accordance with the public policy, for all kinds of legislative bodies, instead of forbidding a certain act and providing a fine or a penalty in case that act is committed, rather to invite a certain line of action that would be thought to be in the line of public policy by granting certain privileges in connection with it. A large part of our taxing goes along on that line. Everywhere, if you pay certain fees, you may do certain acts. That does not simply apply to corporations; it applies to individuals as well. The corporation, as you say, is the creature of the State; but the individual is not in the same sense the creature of the State. Yet you grant licenses to individuals as you do to corporations. It is simply a generally recognized principle of law, so far as I am aware, in all kinds of law-making bodies, applying to individuals as well as to corporations, that for certain lines of activity it is better to invite people to meet certain conditions, if they will, and do certain acts, or to meet certain conditions and refrain from doing certain acts, than to legislate entirely by penalties and fines.

Mr. MALBY. Oh, that I concede.

Mr. JENKS. It seems to me that this bill of ours is of that same nature. This is not a compulsory act; it is a permissive act. Here are certain things that are in the interest of the public that we would like to have carried out. We say to the corporations, "If you will furnish this information, if you wish to come under this law, we will grant you certain immunities. You take your choice. It is perfectly immaterial."

Mr. MALBY. But can you do that? Can you grant immunities to one because he is willing to give the information that you do not grant to another who is not willing to give the information, provided the information you require is not within the power of Congress to dictate?

The CHAIRMAN. Provided it is information which you have not any legal right to?

Mr. JENKS. No; it seems to me, Mr. Chairman, if you will pardon me, that that expression of yours, and the other expression also, is not quite an accurate expression. It is rather this: "If you will grant the information we desire you may have certain privileges," which we grant it is in the public interest, and which you yourself would grant that it is in the public interest for us to have.

Mr. MALBY. I think that is the all-important question.

Mr. JENKS. I do not know that there is anything further to be stated on that matter.

Mr. MALBY. I do not know that there is.

The CHAIRMAN. Should we enact legislation to compel the production of information that is not Federal in its character? I will put it that way. That covers the whole ground. That is, should we, as a matter of policy, enact legislation, Professor, for the purpose of compelling the production of information that is not Federal in its character?

Mr. JENKS. Personally, I should be inclined to say that we ought not to compel the production of information that is not Federal in its character.

The CHAIRMAN. Do we not practically do it if we say that we will give the corporation immunity from crime if it will furnish it?

Mr. JENKS. I refer to the expression that was used a moment ago as to an indirect way of compulsion—it does not look to me like that. It looks to me quite of the other type.

The CHAIRMAN. We do propose to give them immunity from crime if they do certain things, do we not?

Mr. JENKS. Certainly; you grant the immunity, provided they are willing to do that; and they take their choice. I do not think it is right to call that compulsion.

Mr. Low. Mr. Chairman, I do not think we do grant immunity from crime in the ordinary sense.

The CHAIRMAN. Why not?

Mr. Low. What we do say is: "Upon that condition you can ascertain what the attitude of the prosecuting arm of the Government is going to be—whether they are going to attack you for this thing which you have done or want to do, or whether they are not;" and that is all that the bill covers.

The CHAIRMAN. I think it quite likely that I misunderstood you the other day, Mr. Low. I understood you to say that all these corporations were committing crimes, and that you could not indict a whole public, and that in order to get rid of a condition where everybody was committing crime it was wise to put them in a situation where they could file some statements which would show that the acts that they had done were not crimes, which, it seems to me, is giving immunity for what is now an existing crime. I do not know whether I misapprehend it or not.

Mr. Low. Well, perhaps I was misunderstood, Mr. Chairman. I did not intend to say that.

Mr. ALEXANDER. You came pretty near saying that.

The CHAIRMAN. I think you did.

Mr. Low. What I mean is this: I still adhere to that proposition, Mr. Chairman; but this is what I want to make clear: Under the law as it stands, it is the business of the Executive—speaking of the

Executive as representing all the administrative departments—to determine who is to be prosecuted under that law.

The CHAIRMAN. That is, who of this vast mass of corporations that are now committing crimes should be selected out for prosecution?

Mr. Low. Yes. As a matter of fact, three or four combinations have been selected out and have been prosecuted. Nobody knows who is to be the next one or when the next one will be attacked. This bill of ours does not change the legal status of any action done under the Sherman antitrust act, but it does say—

The CHAIRMAN. It does not change the legal status?

Mr. Low. I do not think so, of anything done.

The CHAIRMAN. Does it not make combinations reasonable that are now unreasonable under the strict construction of law? And if it does not, what does it accomplish?

Mr. Low. I think it simply gives an opportunity to the executive arm of the Government, represented by the Department of Commerce and Labor, to say whether it is going to attack that combination or not under the Sherman law. That is all it does, and it says that quickly, instead of leaving it uncertain for a long period of time. If, in the brief period that may be fixed by the bill, it does not say that the thing is in unreasonable restraint of trade, it can still attack at any time in the future if it changes its mind, if conditions show that it has been mistaken; but then it can only attack on the ground that the thing is in unreasonable restraint of trade.

The CHAIRMAN. Do I understand you to say this: That the conditions will continue the same; that the law operates the same; that it does not change the status; that you simply allow the offenses to be committed under the law and declare them to be criminal; but you do not allow a certain sort of offenses to be prosecuted? Is that what the effect of the bill is?

Mr. Low. I think the effect of the bill is to determine at once, and quickly, whether the Government is going to attack a proposed combination that may be submitted for its inspection.

The CHAIRMAN. You do not change the provisions of the law? They are still unlawful?

Mr. Low. They are still unlawful.

The CHAIRMAN. But you do not allow certain ones to be attacked; and that is the indirect way of reaching the result?

Mr. Low. That is it, exactly; because it is thought that the Congress can perfectly control the action of the Attorney-General or the Government in bringing suits.

The CHAIRMAN. I suppose we would have to concede that the impending danger up to date would not seem to be very acute; because while those conditions have existed for the last eight or nine years, the prosecutions have been almost nil. The case that was brought in here before us Saturday seemed to be a case that it was quite wise to prosecute, so far as that is concerned; it was practically admitted by the gentleman who presented it. So that there is not any very great danger to anybody under the existing conditions on account of what you may call the inaction of the Department of Justice.

Mr. ALEXANDER. You refer to Mr. Shieffelin's drug case?

The CHAIRMAN. Yes.

Mr. MALBY. I hardly think you mean to say, Mr. Low (or if you do, it is not necessary to say under your bill), that these men who take

advantage of the provisions of this act if it is passed still continue to commit crime, because the only crime they commit is under the Sherman law, and if they are absolved from the provisions of the Sherman law they are no longer lawbreakers.

Mr. Low. Of course the bill has two faces.

Mr. MALBY. It does change the Sherman law.

The CHAIRMAN. It is supposed to.

Mr. Low. The bill has two faces—toward the past and toward the future. Toward the past it does change the Sherman law, because it says that as to those who give this information no suit shall be begun thereafter against them except on the ground that the combination in restraint of trade is in unreasonable restraint of trade.

The CHAIRMAN. Does it not change it as to the future also?

Mr. Low. As to the future, it proposes the plan that I have been trying to make clear—that if anybody wants to enter upon a new contract in restraint of trade he can submit it to the Department of Commerce and Labor upon the conditions named in the bill, and be told, within the period fixed by the bill, as to whether the Government thinks that is a combination that ought to be attacked under the Sherman law; and he can learn that immediately, instead of going ahead for years only to find, at the end of years, that what he supposed was lawful was really unlawful. If the Government says that it is in unreasonable restraint of trade (which is practically what the Attorney-General has to say when he begins a suit, that it is in unreasonable restraint of trade) then the parties are warned, and they need not do what they have proposed to do. If, on the other hand, the Government does not, within that period, say that it is going to attack it can thereafter only begin the suit upon the ground that it is in unreasonable restraint of trade. In a contingency, of course, the Sherman law is changed, but the contingency has to take place before it is changed.

The CHAIRMAN. It is simply a question of point of view and how you state it.

Mr. Low. Yes.

The CHAIRMAN. I suppose both, in other words, are in essence the same. Now, Mr. Low, if you please, it is almost the hour for the House to be in session; and one or two of us have some matters on the floor to attend to the very first thing. At what time would it be agreeable to you to resume, Professor?

Mr. JENKS. Any time at your convenience.

(An informal discussion then ensued as to the time of the next meeting, during which Mr. Low stated that he would personally prefer to have the next meeting on Thursday of the following week.)

The CHAIRMAN. The understanding we had on Saturday was that we would go on to-day, use up to-day, and then probably suspend and begin again a week from to-day. I think that was the understanding Saturday, and I suppose Mr. Towne has gone home with that understanding in view.

Mr. Low. I can easily communicate with him if the date is changed. It is exceedingly inconvenient for me to be here a week from Monday—that is, a week from to-day.

The CHAIRMAN. After to-day, when would it be convenient for you to be here again?

Mr. Low. As far as I am personally concerned, I should rather have it Thursday of next week. Then I can give, if necessary, Thursday, Friday, and Saturday to the subject.

The CHAIRMAN. Thursday of next week?

Mr. Low. Yes, sir.

The CHAIRMAN. Or do you mean Thursday of this week?

Mr. Low. Thursday of next week.

Mr. HENRY. You could not go on on Friday. That is a regular committee meeting day.

The CHAIRMAN. You want time for careful preparation, of course?

Mr. Low. Yes; this point we will have looked up. Of course I appreciate the importance of it, but my point is that I should like to be able to arrange for a hearing before the Senate Committee at the same time that we come here.

The CHAIRMAN. You think you would be able to do that about a week from Thursday?

Mr. Low. I should think so; somewhere toward the end of next week.

Mr. PARKER. Mr. Chairman, I want to remind Mr. Low of the danger of postponing this hearing too far, as we have to go through the full committee and through the House at the same time. But you will really make time by—

Mr. Low. We have got to meet again either on Monday of next week or some following day, on account of the arrangement made by the Merchants' Association.

The CHAIRMAN. Yes; I suppose that will be fair.

Mr. Low. And therefore it would be a very great convenience to me personally if, when we meet next week, we could sit continuously until we are through.

The CHAIRMAN. So far as the subcommittee are concerned—at least, so far as I am concerned—I am ready to sit right along through, except that when it comes to a Judiciary Committee meeting we sometimes feel that we ought to be in the regular meeting of the committee. I am perfectly willing to start on Monday next and keep right straight along, except Wednesday and Friday, every day of the week, so far as may be necessary to get reasonable hearings. Or I will meet Thursday, a week from this Thursday—any day that suits the people interested in the measure.

Mr. ALEXANDER. But if you meet a week from Thursday you can not go on on Friday forenoon.

The CHAIRMAN. No; we can not go on on Friday forenoon.

Mr. HENRY. It seems to me we had better let it go over until Thursday week.

The CHAIRMAN. Will that be agreeable all around?

Mr. ALEXANDER. That will suit me.

Mr. DAVENPORT. So far as I am concerned, I have no objection; but if it would advance the progress of this discussion that I should go on to-morrow, I am perfectly willing to go on to-morrow. I am entirely at the disposal of the convenience of the committee. All we want to do is to have an opportunity to present our objections to this bill.

Mr. JENKS. Mr. Chairman, if we could perhaps begin this afternoon a little earlier, I myself (unless there are a great many questions to answer) could finish in fifteen or twenty minutes the points

I want to present. Perhaps some new points of objection could be made this afternoon.

The CHAIRMAN. Yes. Then suppose we suspend until half past 1 o'clock, subject to the condition that if we do not get through with the employers' liability bill by that time, we will have to wait until we do.

Mr. JENKS. Certainly.

The CHAIRMAN. Then we will come right up immediately after that. We can, perhaps, arrange then as to just what time we will fix for later sessions.

(The committee thereupon took a recess until 1.30 o'clock p. m.)

AFTER RECESS.

The subcommittee met at 1.30 o'clock p. m., pursuant to the taking of recess, Hon. Charles E. Littlefield (chairman) presiding.

The chairman announced the decision of the subcommittee to adjourn, at the conclusion of this afternoon's hearing, until Thursday, April 16, at 10.30 o'clock a. m., in order to accommodate various persons desiring to be heard before the subcommittee.

STATEMENT OF MR. J. W. JENKS—Continued.

Mr. JENKS. It seems to me that perhaps we could sum up the main points that were under consideration this morning in a word or two, and then take up some of the other points afterwards. As I understand, the question at issue is this: Has Congress power to relieve corporations from some of the penalties of the Sherman Act on condition that the corporation furnish information, some of which perhaps Congress could not compel it to give. So far as the supporters of this bill are concerned, they will take the position on that matter that presumably Congress can do that. If so, good; we would like to have our bill passed. In case it should be thought by the committee, or otherwise it should be decided in the courts and found that Congress could not go beyond the securing of the information that it has a right to compel the corporations to give, then they could grant the relief from certain of the provisions of the Sherman law on condition that the corporation furnish all the information that Congress can compel it to furnish.

One other point along that line is this: One reason why it has seemed wise to us to leave this questioning to the President, instead of putting the questions in the bill as we had intended to do, is that the President, with his legal advisers, would be in a position to see how far he could go along that line, and perhaps would be able to go somewhat further than we could wisely put into the law itself. So far as this committee of the Civic Federation is concerned, it has practically no choice as to whether the questions should be left to the President or included in the law, so long as the investigation is thorough enough.

Mr. LITTLEFIELD. That is, you want the results in the most feasible way?

Mr. JENKS. In the most feasible way, and also we want to insure a large degree of publicity. I will cite one illustration in favor of the contention made this morning, merely as an illustration, because

you were asking for illustrations. It has seemed to me and to some others who made the suggestion that the Federal Government now, in its control of steamboats that are engaged in interstate commerce, or that are on the ocean under the control of the Government, is acting pretty largely under similar conditions to those proposed in this bill. The Government says "You may carry on your business as a steamboat provided you will submit to certain rules of inspection." The steamboat company can go into the business or not as it likes, but if it goes into the business it must have its boilers inspected and its officers must submit to certain conditions, and it must meet conditions as to life-saving apparatus and equipment and fire equipment.

Mr. ALEXANDER. There is no question there but what the Government has absolute control?

Mr. JENKS. Absolute.

Mr. ALEXANDER. Over everything that sails on the water.

Mr. LITTLEFIELD. It is further true that every one of those requirements is connected with either the safety or the facilitation of commerce.

Mr. JENKS. Yes, sir. Now, there is a question whether these requirements that the bill calls for are not also connected with the holding down of monopolies, which may be looked upon not as a matter of physical safety, but as matter of absolute safety so far as business is concerned, considered in relation to the public welfare.

Mr. LITTLEFIELD. Does it not come down to this, whether the effect is theoretical or practical?

Mr. JENKS. No; I should say whether it is a thing that can be reached directly, or whether it is not so direct a measure.

Mr. LITTLEFIELD. Of course there is another fact involved in this, that Congress confers admiralty jurisdiction on the courts, and therefore we have the admiralty jurisdiction in addition to that.

Mr. JENKS. I have been speaking with reference to the questions of registration, and with reference to the questions that could be asked—

Mr. ALEXANDER. Just one word. Were you going on to-day further with the consideration of that point that Judge Malby raised just before the adjournment?

Mr. JENKS. If I recall, that was the question as to the relationship of the Federal Government to the State corporations as compared with the interstate corporations.

Mr. LITTLEFIELD. No; the question was whether we could do indirectly what we could not do directly.

Mr. ALEXANDER. Let me put a concrete case in a homely way. Suppose the Vanderbilt lines and the Pennsylvania lines want to pool. The Government says, "If you will show me the cards in your hand, I will tell whether you can play." Two of those cards the Government could compel them to show under its control of interstate commerce. Three of them are intrastate, clearly. Now, the question is, can the Government in this way control those three—get the information on those three points that is entirely intrastate?

Mr. JENKS. By granting them this privilege if they will tell?

Mr. ALEXANDER. Yes. Is not that granting them indirectly what is not granted to them directly?

Mr. JENKS. Yes; that is the point at issue.

Mr. LITTLEFIELD. The first question is the question of power, and next is the question as to whether it is wise to exercise the power in that way.

Mr. JENKS. Yes. I think it is often desirable, even if the power exists, instead of using compulsion, to secure the information by granting privileges.

Mr. LITTLEFIELD. That involves those two great underlying social propositions involved in all legislation.

Mr. JENKS. Yes. So much for corporations that have a capital stock. The second part of this section has to do with the registration of the other corporations. The bill says:

Such registration by a corporation or association not for profit and without capital stock may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth, first, its charter or agreement of association and by-laws; second, the place of its principal office, and, third, the names of its directors or managing officers, and standing committees, if any, with their residences.

That is to say, corporations not for profit are not required to show as much as those that are for profit. Of course the reason for that is apparent. These corporations without capital stock cover, of course, innumerable associations, such for example, as these gentlemen here are representing.

Mr. LITTLEFIELD. Do you think this does cover a voluntary association?

Mr. JENKS. Yes; this will cover them. They may register if they like.

Mr. LITTLEFIELD. It says "a corporation or association not for profit." To me that conveys the idea of a legal organization.

Mr. JENKS. Certainly, of an organization that is legal.

Mr. LITTLEFIELD. No; but I mean an incorporated organization. Of course every association that is organized for a legal purpose is a voluntary association. Of course all organizations of labor that are not organized for an illegal purpose are voluntary associations.

Mr. JENKS. Those are the associations I had in mind. There is a large group of them. I have spoken of one class of them. Then we have chambers of commerce and trades unions which have to be included also. All of the organizations that are not incorporated, and whose prime purpose is not for profit, come under that class. What we had in mind, of course, was, as you know, primarily the farmers' organizations and—

Mr. LITTLEFIELD. What kind of an association did you have in mind, organized without incorporation and without capital stock?

Mr. JENKS. Some of the trades unions are not incorporated. Take the American Federation of Labor, is that incorporated?

Mr. LITTLEFIELD. That is incorporated.

Mr. GOMPERS. Very few of them are incorporated. I was under the impression until last Saturday that the Order of Railway Conductors was an incorporated trades union, but I was informed that it was not, and later, when Mr. Garrison, its chief executive officer, addressed the committee, he said that the organization at one time was incorporated, but it now is unincorporated.

Mr. JENKS. It was, of course, in order to cover all such organizations that this provision was put in as to organizations incorporated and not incorporated.



Mr. LITTLEFIELD. I understand the tendency now is, so far as the trades unions are concerned, against instead of toward incorporation.

Mr. EMERY. The International Typographical Union is incorporated?

Mr. GOMPERS. No, sir; it is not incorporated.

Mr. JENKS. It was felt with reference to such organizations that there was a large proportion of these questions that would be asked of an incorporation organized for purposes of profit, very few of which would apply to incorporations not for purposes of profit.

Mr. LITTLEFIELD. Practically none of them would apply?

Mr. JENKS. None of them, practically; and we felt that it would be sufficient if they furnished this information: First, the charter or agreement of association and by-laws; second, the place of its principal office, so that it could be easily found; and third, the names of its directors or managing officers and standing committees, so that further information could be secured; and if that would be supplied from year to year, so that it might be kept up to date, we saw no reason why there should be such publicity as there would be with reference to the greater corporations.

Mr. LITTLEFIELD. Before we leave that section I have an inquiry which I would like to make of you.

Mr. JENKS. Yes.

Mr. LITTLEFIELD. What power, according to your conception of this first section, do you vest in the Commissioner of Corporations; that is, executive or judicial power? What is your conception of the kind of power you vest in the Commissioner of Corporations; is it executive or judicial power?

Mr. JENKS. There are two or three different lines of action that in this bill are imposed upon him. With reference to registration, his duty is, of course, purely administrative. He has nothing judicial to do. The corporation furnishes this information, and he must register it.

Mr. LITTLEFIELD. I will ask you this question: Is it competent for Congress by legislation to vest in the executive branch of the Government any judicial powers?

Mr. JENKS. I should say yes; but at the same time I realize how very limited that power is in any such way.

Mr. LITTLEFIELD. I guess you had better consult a lawyer on that.

Mr. JENKS. I was about to cite an illustration.

Mr. LITTLEFIELD. Yes.

Mr. JENKS. A "judicial" power is something that is pretty indefinite; but I should say that the decisions of the Comptroller of the Treasury are in their nature essentially judicial, and at the same time nobody questions that the Comptroller of the Treasury has the right to make the decisions which he makes. Some one might think his powers purely executive, but when it comes to deciding the general lines of policy to be followed the Comptroller renders his decisions, and that function is spoken of as a judicial function.

Mr. LITTLEFIELD. Is it your opinion that it is competent for Congress by legislation to vest an Executive Department with judicial power, which involves the correlative; is it competent for Congress to vest in the court, a judicial body, executive power? That is the kernel of the whole proposition. If you are not familiar with that, I will not press you on it.

Mr. JENKS. I am very familiar with the question and also with the difficulty of answering. The difficulty of the answer comes largely on this account, that both those words, "executive" and "judicial," are used with a great variety and number of shades of meaning. If I say yes, you can cite any number of examples where we have separated the powers, and if I say no, you can cite any number of instances where you know perfectly well both powers are exercised by the same body or person. Take the courts; the courts have an appointing power. We say an appointing power is an executive power, and under those circumstances I would say yes, that Congress does have a right to vest a judicial body with executive power. At the same time the question comes up, has Congress a right to grant a judicial power to an executive officer, and I say yes, and I cite the example of the Comptroller of the Treasury, whose duty it is to make decisions that are judicial in the ordinary sense of the word.

Mr. LITTLEFIELD. I am speaking of the constitutional sense of the word. I am speaking as lawyers ordinarily speak, with the constitutional conception of the term.

Mr. JENKS. May I answer with specific reference to the bill?

Mr. LITTLEFIELD. I want to get the proper legal steps. See if you agree with me. Is it not generally conceded that the Government consists of three branches of power, the executive, legislative, and judicial, within which each branch is absolutely supreme and can not be invaded by the others? Do I make myself clear?

Mr. JENKS. Yes, sir. May I reply in a general way, also?

Mr. LITTLEFIELD. I will go a little further.

Mr. JENKS. My answer is, not that I assume that, but that that is the general statement that is commonly accepted.

Mr. LITTLEFIELD. That is all I say. My question is whether it is competent for Congress to vest a well-recognized—I will put it that way so as to eliminate any element of uncertainty and doubt—to vest a well-recognized judicial power in an executive?

Mr. JENKS. Speaking again with the legal point of view—I speak with a great deal of hesitancy because I do not pretend to be an authority along that line—presumably not. But let me say, a considerable part of my work as a teacher and student of politics and political science in the last few years has been to show that in spite of the fact that that is so, our executive and legislative and judicial departments are working together all the time, and necessarily so, and it is practically impossible for either of them to work alone; the interrelation is so close that our Government could not exist otherwise. That being the fact, I think it is also a fact that whatever the courts may say with reference to a specific case, whatever the theory may be that is laid down in the Constitution itself and in the courts, we are nevertheless continually stepping over that boundary line.

Mr. ALEXANDER. In other words, you recognize that the President is a very large part of Congress?

Mr. JENKS. Certainly.

Mr. ALEXANDER. For he can override legislative action at any time?

Mr. LITTLEFIELD. That does not even reach the fringe of this question.

Mr. JENKS. No. The fringe is reached by the fact that the power is granted in the Constitution itself.

Mr. LITTLEFIELD. As to this registering, is that an executive or a judicial act?

Mr. JENKS. That seems to me to be an executive act.

Mr. LITTLEFIELD. Then, do you provide an appeal from that so that the judicial shall revise the executive discretion?

Mr. JENKS. That registration is purely an administrative act, and could not go further than that. In case they refuse to comply with this rule, or in case the information furnished is false in any material particular, it is provided that the Commissioner of Corporations shall have power to cancel the registration. Now, when it comes to make a decision as to whether it is false or not false, then it seems to me that the Commissioner of Corporations is expressing his opinion, and that is proper for that to be reviewed by the court.

Mr. LITTLEFIELD. That makes it a judicial function.

Mr. JENKS. I think it makes it entirely proper, and not only proper but legal, to have a provision for the review.

Mr. LITTLEFIELD. But that makes a judicial proposition, to that extent, and if it did not make it a judicial proposition, it would not be competent to provide for a review by the court.

Mr. JENKS. On that point I can make no answer. I am not advised well enough to answer it. That is purely a legal proposition that I am not advised on. It seems to me that there is an essential difference, at any rate in public policy if not in legal construction, and it seems to me that the appeal is proper and natural here, and in the other case it will be absolutely useless at any rate.

Mr. LITTLEFIELD. We can speak of that when we come to it.

Mr. EMERY. I would like to be allowed to ask the professor a question here.

Mr. LITTLEFIELD. As to the proposition involved in the other section which relates to unreasonable restraint of trade, I will reserve that.

Mr. JENKS. May I state one or two other illustrations to show how this line between executive and judicial, after all, is perhaps to a considerable extent a matter of the judgment of Congress itself in a particular case. You speak of the rate bill. As you yourself have said, that was a matter of long discussion and of the greatest differences of opinion, which word you should label it by, although the act to be done was clearly in mind. There may be cited again the case of the Secretary of Commerce and Labor with reference to the admission of an immigrant; shall the immigrant be admitted or shall he not? He has to interpret the law in that particular case, and there is no appeal. We speak of the Secretary of Commerce and Labor as an executive officer, but in any ordinary use of the word he is exercising a judicial function there. So we are likely, I fear, to be quarreling over perhaps the technical meaning of a word which may have been construed by the court, but perhaps has never been construed. In our ordinary acceptance of the word, it is a judicial function performed by an executive officer, granted by Congress to the executive officer.

I make another point, that it is a possible position to take that when Congress confers jurisdiction on an executive officer, it is perhaps constituting him for that purpose a judicial officer. The Interstate Commerce Commission is looked upon as an executive body, but, nevertheless, a large part of the work it has to do is spoken of as judicial, and an appeal lies from its decisions to the courts. The

question is, Has not Congress to-day power to give judicial functions to a body that is ordinarily, I think I may say, executive? If that is the case it may have jurisdiction in this particular case, for Congress has power to confer judicial power upon a man who is engaged in executive work.

Mr. LITTLEFIELD. The question is not whether it has power to confer it upon him, but the question is whether it undertakes to do so by this bill.

Mr. JENKS. I should say that the bill simply says this, that it is not necessary to answer that question if Congress has the power. All we need to answer is whether it is wise and expedient for Congress to grant that power to the Commissioner of Corporations, and it is simply leading us into an interminable wrangle over the definition of a word to raise this question as to whether the function is executive or judicial. If Congress has the right to grant this power to him that is all we need say.

Mr. LITTLEFIELD. If in the part of your bill relating to appeal, you clearly confer upon the Commissioner of Corporations executive power only, which involves the exercise only of executive discretion, do you then claim that we can provide in another section for a judicial review by the court? Now, I doubt if it advances the argument a great deal to discuss the question of judicial power from the standpoint of what is known as the common and ordinary popular acceptance. We are going to be confined, when we enact this legislation, to the constitutional power of Congress, and we must take the legal acceptance, even though it may contravene the popular acceptance. Is not that true?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. Then, is it not important for us to know whether we are giving an executive power only, or whether it involves judicial power? You are predicating the power of review upon the wrongful exercise of executive discretion.

Mr. JENKS. As I say, if you can confer upon him executive and judicial power, then, assuming that, you do not need to ask the question as to whether this specific act gives him one or the other.

Mr. LITTLEFIELD. Why not? Suppose they have power to confer both executive and judicial power, and the language we use confers only executive power. Having conferred that power, can we proceed to review that by the judicial power?

Mr. JENKS. I should say if you conferred the reviewing power here, that in itself carries with it the power to judge whether the acts of the Commissioner are right, and that in itself is judicial action. Of course you can do that. Then again, you can say that he must register. That is executive power.

Mr. LITTLEFIELD. Your answer simply departs from my hypothesis.

Mr. JENKS. Then later, when you give him the power to cancel the registration, you can label that judicial power. It seems to me this comes so clearly upon the same lines as powers that have been conferred upon the Interstate Commerce Commission and others that there is but little question that Congress has the power to grant this which may be called judicial power and then to grant the other afterwards.

Mr. LITTLEFIELD. We have had this question before the Judiciary Committee and discussed it year after year; as, for instance, whether we could give judicial discretion to the Spanish Claims Commission. We have had that thrashed out here. The contention was that the Spanish Claims Commission was not a judicial body.

Mr. JENKS. We shall be very glad to submit a legal opinion on that later.

(See later in the testimony cases cited showing that the power may be granted, according to the contention of Mr. Jenks.)

Mr. LITTLEFIELD. Yes; very well. Proceed with your statement.

Mr. EMERY. I wanted to ask what the reason was for conferring the power on the Executive in prescribing these rules and regulations for obtaining this information, first to obtain from a corporation for profit the contracts relating to the subject-matter of interstate commerce, and not the power to take from a voluntary corporation or corporations not for profit in their contracts relating to the same subject-matter?

Mr. JENKS. That is something that will come up a little later.

Mr. EMERY. No; but you distinguish between corporations for profit and voluntary associations not for profit. From one you exact only the names of the officers, a copy of its charter or agreement of association and by-laws, and the place of its principal office; but from the corporation organized for profit you exact "such information concerning the organization of such corporation or association, its financial conditions, its contracts, and its corporate proceedings, as may be prescribed by the general regulations from time to time. Now, there is nothing which requires from the corporation not for profit information as to its contracts and proceedings.

Mr. JENKS. That question comes up later. One reason was that there was no public reason or danger that would make it desirable that those corporations should file anything more than that, and that we could get at them and find them if we had the information as to their officers and directors, and the place of their principal office. As to the question of contracts, that comes up later.

Mr. EMERY. I wanted to know what was the reason for that, in this connection.

Mr. JENKS. The distinction is made here because if you find out who their directors are, and if you have their charter or agreement of association and their by-laws, you have found out everything that will apply to them, speaking generally; but when he come to the question of contracts—

Mr. Low. May I venture to answer the question, because I think I did in my opening statement. The questions relating to contracts relate to their financial proceedings; they are asking the money of the public with which to proceed in their business. Those corporations which are not for profit are doing no such thing, and that is the reason for the distinction.

Mr. JENKS. You are referring, Mr. Emery, to something that I have not touched upon at all.

Mr. EMERY. I am referring definitely to the distinction in registrations between corporations for profit and those not for profit in the section which you have just discussed.

Mr. JENKS. In that section I am now speaking of there is nothing said about any contract of any nature whatever.

**Mr. EMERY.** As to the conditions under which they can register, a definition of what constitutes registration, this section says:

Such registration, by a corporation or association for profit and having capital stock, may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth such information concerning the organization of such corporation or association, its financial conditions, its contract.

When it comes to the filing, to the registration of a voluntary association or an association not for profit, it provides that registration there is to be effected by doing three things. It provides as follows:

Such registration, by a corporation or association not for profit and without capital stock, may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth, first, its charter or agreement of association and by-laws; second, the place of its principal office, and, third, the names of its directors or managing officers, and standing committees, if any, with their residences.

I wanted to know whether the power is conferred upon the Executive to exact from corporations not for profit contracts which affect interstate commerce from their standpoint. Mr. Garretson took as an illustration the other day, in the course of his discussion, twelve railroads entering into contracts with the railway brotherhood. These are contracts made by the association evidently affecting interstate commerce and the interchange of commodities between the States and the operation of the physical means by which they pass from one State to another. What reason is there that on the one hand the President can exact from the railroads a statement of the contracts into which they enter, but on the other hand can exact no statements from the twelve other parties as to the agreement of combination into which they enter?

**Mr. JENKS.** I may reply again as I did a moment ago. I had overlooked the fact that the word "contracts" is in there. That provision with reference to contracts is taken up most specifically later. Here there is simply a power granted to the President as to the conditions of registration. It seemed to me that the point you were bringing up was out of its proper order.

**Mr. EMERY.** It can not be exacted from them under the subsequent sections.

**Mr. JENKS.** It would seem to me that the question was more appropriate later.

**Mr. LITTLEFIELD.** Of course the bill ought to be consistent throughout.

**Mr. JENKS.** I think it is.

**Mr. LITTLEFIELD.** But your idea in section 10 evidently covers the suggestion of Mr. Emery?

**Mr. JENKS.** Yes, sir.

**Mr. LITTLEFIELD.** Proceed with section 9.

**Mr. JENKS.** Section 9 at the beginning simply gives the President the power, as I have said before. The second part of section 9 reads as follows:

Nothing in this act shall require the filing of contracts or agreements of corporations or associations not for profit or without capital stock, and such corporations and associations while registered hereunder, and the members thereof, shall be entitled to all the benefits and immunities given by this act, excepting such as are given by section ten and section eleven, without filing

such contracts or agreements; but from time to time every such corporation or association shall file with the Commissioner of Corporations, when and as called for by him, a revised statement giving, as of a date specified by him, such information as is required to be given at the time of original registration under section eight of this act.

It has seemed to us in considering that matter that there was a very important difference indeed between most of the corporations or associations that were without capital stock and not for profit and those that were. Corporations that are for profit and that have capital stock are dealing primarily, as was suggested before, with products, with wealth, with capital, with things that do not touch immediately and primarily the individual life and the individual rights of the individual, the personal rights of the individual, to the same extent that the contracts made by labor organizations, if you please, and by other similar organizations, do touch them as individuals with their individual rights. I will state that again in different words. The agreements that are made primarily by the trades unions, trade agreements, if you like, between them and their employers, the agreements that they make among themselves so far as their organization is concerned, are agreements that have to do primarily with them as individuals, with their liberty to act as individuals, and not primarily with property. It seems, therefore, that it is entirely proper and right to make a distinction between organizations that may be attempting, we will say, to monopolize capital, to monopolize the power of capital in many ways, and those that are dealing with the power to work simply; with the personal power of individuals as men and not with the power to handle capital of others.

Mr. LITTLEFIELD. If the contract affects interstate commerce, where do you get your distinction? No contracts are to be filed unless they are to affect interstate commerce, and if the labor organizations affect interstate commerce, why should they not file contracts as well as organizations of the other kind?

Mr. JENKS. I would say this: The whole purpose of this bill, and of most legislation, is a question of public policy; what is wise and just and what is in the public interest.

Mr. LITTLEFIELD. Certainly. I suppose it should operate equally, should it not—"wise and just?"

Mr. JENKS. The question is whether a law which operated in exactly the same way on people who are situated differently would operate equally.

Mr. LITTLEFIELD. You have not given a definition of class legislation. I would like to have you give it.

Mr. JENKS. There is, I should say, no class legislation here.

Mr. LITTLEFIELD. I am not intimating that there is, but you have intimated that there is a distinction between the people on whom the law operates.

Mr. JENKS. I say there is a distinction between the classes of corporations. One is a class that is conducted for profit and has capital stock, and the other is not for profit, and it has no capital stock. This second class of corporations or associations I have been speaking of are of various kinds. There are some such examples as the Associated Press, which furnishes a convenient way of handling their news business all the way through, and there are others, such as are represented by these gentlemen here to-day, which are organized for

carrying into effect objects in which they are interested, which are not for profit, directly. There are others, like the farmers' organizations, for carrying on the work that they think is wise and just, and to promote their legitimate interests, and there are several others, such as scientific associations that I am connected with. All of these are not for profit.

Mr. LITTLEFIELD. Do I understand you that that word "legitimate" would discriminate in favor of agricultural institutions?

Mr. JENKS. I understand this, that where the associations are of an entirely different nature from the capital-stock organizations I have been speaking of they should be treated in a different way.

Mr. LITTLEFIELD. Is not the test of all this legislation the effect on interstate commerce? If contracts between associations with capital stock and organized for profit affect interstate commerce, and contracts between associations that have no capital stock and are not for profit also affect interstate commerce in the same way, does that suggest any idea why there should be a difference in treatment? Is not the central point of the whole business the effect on interstate commerce?

Mr. JENKS. The central point of the whole discussion is connected with interstate commerce.

Mr. LITTLEFIELD. Connected? Is it not to regulate interstate commerce?

Mr. JENKS. I should say not. It is to affect the present method of regulating interstate commerce.

Mr. LITTLEFIELD. Is not that another way of stating the same proposition, or do you mean something different?

Mr. JENKS. No.

Mr. LITTLEFIELD. Then do I understand you to say that the main purpose of this legislation is not to regulate interstate commerce, but you have another purpose in it?

Mr. JENKS. Oh, no; I shall not state that.

Mr. LITTLEFIELD. Is not that the main purpose?

Mr. JENKS. The regulation of interstate commerce?

Mr. LITTLEFIELD. Yes.

Mr. JENKS. It is connected with interstate commerce.

Mr. LITTLEFIELD. That means connected so that it is a part of it? It does not mean a connection that is not a part of it?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. That means connected with interstate commerce?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. So that whatever is connected with interstate commerce is a part of it, so that we can cut out those two words?

Mr. JENKS. Yes; so long as we understand each other.

Mr. LITTLEFIELD. When you say "connected with interstate commerce," that means the same as I mean when I say "interstate commerce." Now, I would like to know whether there should be any distinction in this bill between any two sets of contracts that affect interstate commerce in the same way; that is the precise, naked proposition.

Mr. JENKS. The main point is that the two sets of contracts do not affect interstate commerce in the same way.

Mr. LITTLEFIELD. That is a different proposition. Of course if there is a class of contracts that do not affect interstate commerce—

Mr. JENKS. Or affect it in a different way.



Mr. LITTLEFIELD. Do you mean to say that it makes a difference how it affects it? Do you mean when you say that that it affects it differently—that is, you mean favorably or unfavorably?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. There is no question of that kind raised in this bill, that contracts affect interstate commerce favorably or unfavorably, but you say all kinds of contracts, irrespective of their favorable or unfavorable effect, when they are made by associations of certain kinds. How do you differentiate in your bill as to the effect? Point out the language which says that they need not file a contract which affects interstate commerce favorably.

Mr. JENKS. They make the contracts for a different purpose.

Mr. LITTLEFIELD. Do you make the proposition or the argument that certain associations will not or can not make any contract that affects interstate commerce?

Mr. JENKS. No, sir; but the contracts that they make which affect interstate commerce are of an entirely different nature, so that they ought not to be treated in the same manner.

Mr. LITTLEFIELD. Have you any clause here that makes any distinction with reference to whether the contracts are of a favorable or unfavorable character?

Mr. JENKS. It is not a question of favorable or unfavorable character, but it is a question of the kind of contract.

Mr. LITTLEFIELD. I understood you to say that it was the kind of effect of the contract. Will you give me an instance of a contract of the kind you mention?

Mr. JENKS. I should say contracts made between employers and employees, with reference to conditions of labor, and wages of labor, and matters of that kind, even though those contracts do affect, more or less directly—rather less directly than more—interstate commerce, are contracts that are so essentially different in their nature that they should be treated in a different way from those between two or three different railroads or two or three great manufacturing establishments with reference to the limitation that they shall place upon their output or the way that they shall distribute their goods among the different States.

Mr. LITTLEFIELD. How does that affect interstate commerce with reference to the effects we feel from it? In what way does that affect the public so that they experience inconvenience from it?

Mr. JENKS. It is quite possible there may be a contract made between various corporations regarding the distribution of their goods in such a way that it will affect the prices and make the prices higher, with no sufficiently corresponding benefit to the person making the contract.

Mr. LITTLEFIELD. Does that affect interstate commerce?

Mr. JENKS. Yes, sir; possibly it does.

Mr. LITTLEFIELD. Does it affect interstate commerce in any way except as to the transportation?

Mr. JENKS. No; that is the way.

Mr. LITTLEFIELD. Now, how else does it affect interstate commerce?

Mr. JENKS. That would probably be the way.

Mr. LITTLEFIELD. Is not that the only point of contact you can think of?

Mr. JENKS. No, sir.

Mr. LITTLEFIELD. What other way do you think of?

Mr. JENKS. Affecting the routes over which it is transported.

Mr. LITTLEFIELD. The amount transported?

Mr. JENKS. No; the route of transportation.

Mr. LITTLEFIELD. That is practically the same thing.

Mr. JENKS. No; whether it shall go over the lines of one company or of another, whether the price of transportation shall go into the pockets of one company or into the pockets of another.

Mr. LITTLEFIELD. That affects the combination of the shippers. You were speaking of a combination affecting the price. You come right back to the contract between the shippers; and can you think of any other way except that in which it affects interstate commerce, diminishes the amount transported or increases the amount transported in interstate commerce. Can you think of any other point of contact?

Mr. JENKS. I had myself suggested not only the contract with reference to limitation, but with reference to the routes of transportation; but so far as the point is concerned, I do not know that it makes any particular difference.

Mr. LITTLEFIELD. Is there any other point of contact? Take the shippers—the contracts between the shippers. When you go to shipping over different routes, you have a new factor. There is a contract that introduces a new factor into the equation. Now take your equation of two shippers who have made a contract which restricts the output, and therefore increases the price; that is the simplest reduction of the proposition. In what is the point of contact between that contract and interstate commerce, except in the fact that it contains a diminished amount of property transported?

Mr. JENKS. I should say, so far as the illustration is concerned, that is the point. But let me go back to the first illustration.

Mr. LITTLEFIELD. Take a contract between the employer and employee. Suppose a contract should be made between them that would absolutely stop interstate commerce.

Mr. JENKS. Suppose so.

Mr. LITTLEFIELD. You could not conceive of a contract between the shippers that would do that, could you, that would paralyze or stop interstate commerce?

Mr. JENKS. Generally speaking, not.

Mr. LITTLEFIELD. Can you conceive of any contract between the railroads and the shippers that would absolutely stop interstate transportation?

Mr. JENKS. No.

Mr. LITTLEFIELD. It is unthinkable?

Mr. JENKS. It is certainly improbable.

Mr. GOMPERS. May I suggest that there would be no contracts between working men, organized or unorganized, and employers for the stoppage of interstate commerce, or to interfere with interstate commerce? Agreements or contracts would be for the purpose of carrying on interstate commerce, and not for the stoppage of it.

Mr. LITTLEFIELD. The practical experience of many instances has been the other way.

Mr. GOMPERS. No, those were disagreements; they were not agreements.

Mr. LITTLEFIELD. There might be disagreements between the employers, and agreements between the employees. Your point is that it would not be an agreement entered into by the employers and employees?

Mr. GOMPERS. No such agreement would be possible.

Mr. LITTLEFIELD. I do not know about "possible."

Mr. GOMPERS. It is a physical impossibility.

Mr. LITTLEFIELD. But the agreements between the employees independent of the employers have resulted in that way, so that I have confined it to the employees themselves. That you recognize to be a fact?

Mr. EMERY. May I call attention to what Mr. Gompers said in a case where trouble arose from the attempt of the Brotherhood of Engineers to enforce a contract between the employers and employees which was in restraint of trade?

Mr. GOMPERS. I think the records will not bear that out. It was an agreement between the members of the Brotherhood of Locomotive Engineers. It was not with the company.

Mr. LITTLEFIELD. You can cite the case.

Mr. MALBY. I think the subcommittee fairly well understand Professor Jenks when he says that it is the judgment of the gentlemen having the bill in charge that there is a difference between shippers and those in the employ of shippers, with reference to their relations and interstate commerce, and hence he does not regard it so much in the public interest that the detailed statements should be made by the employees as that those statements should be made by the companies by which the commerce is engaged.

Mr. JENKS. Certainly.

Mr. MALBY. Now, whether we agree with him or not is immaterial. We understand what his position is.

Mr. LITTLEFIELD. It is very obvious what his position is: but the question was directed to the alleged discrimination in the matter of contracts.

Mr. JENKS. What you say, Mr. Malby, is strictly in line with my thought, that these conditions are so different that they should be treated differently. Now, I should like to finish what I was saying by way of illustration.

Mr. LITTLEFIELD. I was carrying the thing through on my own line of thought.

Mr. JENKS. With reference to the shippers, they make various kinds of agreements with one another which affect interstate commerce, aside from the effect of checking interstate commerce by raising the price. Take the time when the Michigan Salt Association was organized. One of the essential purposes of that organization was to save waste of energy and the consequent waste of capital and expense by the unnecessary shipping of salt into one another's territory by the different manufacturers. Here is an association that was made up of manufacturers of salt scattered through different parts of the State of Michigan and down through Ohio, and they came together on this. They were shipping salt into one another's territory. A man on the east side of the State of Michigan would be shipping to a man on the west side of the State, and a man on the west side of the State would be shipping to one on the east side of the State. They came together, and as a result each customer was

supplied with his salt from the nearest manufacturing establishment, and the result was the saving of one-half of the price of transportation of the salt. They were not lessening the amount of salt at all; they were simply distributing the salt in a cheaper way. So when I said a little while ago that these combinations of capital might not be choking down commerce by increasing prices, and that that was not the only thing, I had in mind this very thing, that they might so direct the course of interstate commerce that it might be in the interest of the public, or it might not be. It would change the course of interstate commerce in a way that would not come about without such an agreement. Of course there are a number of other ways in which the combinations of capital, by agreements, change the course and affect interstate commerce decidedly. But so far as the committee is concerned, and so far as my own sentiment goes on this matter, the nature of the agreement between the associations not for profit, and without capital stock, is so different from that of the agreements made by the corporations with capital that they should be treated differently. That is why they have been treated differently in this bill, and it is why also our grouping does not seem to us to be class legislation. It is a legislation essentially different in its nature, because they are dealing with transactions that are essentially different in their nature, and if they were brought together in the way intimated by the questions it would be doing injustice and not justice, simply because you would be forcing together things that are not alike in their nature.

Mr. LITTLEFIELD. Two different subject-matters containing different constituent elements, and therefore requiring different remedies?

Mr. JENKS. Different methods of treatment. That is the way it seems to me.

Mr. PARKER. I think I remember on this same topic of dividing things, there was a good deal said about some of the combinations that were made, and of the advantage gained by supplying the neighborhood from the nearest factory.

Mr. JENKS. That was the thought I had in mind a moment ago when I spoke of the salt manufacturers supplying from the nearest place of manufacture. That was what I had in mind.

Mr. PARKER. I think the Standard Oil Company has made some such arrangement with the different factories to supply the country.

Mr. JENKS. There is no doubt that many of these different manufacturers have made combinations along that line, and many of those contracts, I have no doubt, have been, strictly speaking, illegal. Under this act, if it should get through, there are many such contracts that people would like to make, at any rate, that would be illegal; but it is also my judgment that many such contracts might be made that would be legal and beneficial.

Mr. LITTLEFIELD. Is it your judgment that section 9 would authorize labor organizations to enter into any kind of contract and agreement under the Sherman antitrust law? Is that its purpose?

Mr. JENKS. So far as that part of it is concerned, I will speak of it later.

Mr. LITTLEFIELD. Let us have your construction of this last paragraph of this section now. Was it intended to authorize labor organizations to engage in any kind of agreements irrespective of whether they were in restraint of interstate commerce?

Mr. JENKS. It said nothing about that. There is no judgment expressed, and no judgment was intended to be expressed, as to the kind of agreements they might make.

Mr. LITTLEFIELD. You did not intend to reach that by this, at all?

Mr. JENKS. No. Now, with reference to section 10 and section 11, because they cover practically the same thing with the exception that one deals primarily with common carriers and the other with corporations which are not common carriers, there are various points to be made.

Mr. LITTLEFIELD. Take section 10; is it your judgment under that section, or is it the judgment of any of the gentlemen originating the legislation, that the decision of the Commissioner of Corporations should be final?

Mr. JENKS. So far as it goes; yes, sir.

Mr. LITTLEFIELD. Irrespective of the reasonableness or unreasonableness of the contracts concerned?

Mr. JENKS. Yes; it is, so far as his personal judgment is concerned. Let us see what the effect of his judgment is.

Mr. LITTLEFIELD. What is the effect of the section, in your judgment? Does it make the decision of the Commissioner of Corporations final, so far as his judgment in relation to the contract being reasonable or unreasonable is concerned?

Mr. JENKS. It simply states that he may enter an order declaring that in his judgment it is unreasonable. Now, may I state further what the effect of that will be?

Mr. LITTLEFIELD. Yes.

Mr. JENKS. It is simply this: If he decides and files his judgment, and his order in accordance with that judgment, the contract may be attacked by the Attorney-General under the present Sherman anti-trust act. In case he does not file the opinion that in his judgment the contract is unreasonable, the Attorney-General can not attack the contract successfully unless he can prove that it is unreasonable. That is the sole effect of the issuing of that order, or the not issuing of that order.

Mr. LITTLEFIELD. Then the order, if it is made, practically determines that it is a reasonable contract?

Mr. JENKS. Quite the contrary; just the opposite. Let me state that again. A corporation or association that is registered and is not a common carrier may make an agreement. It will file that agreement. In case the Commissioner of Corporations does not within thirty days issue an order stating that in his judgment that contract is in unreasonable restraint of trade or commerce among the several States or with foreign nations, the contract can not be attacked successfully by the Attorney-General, unless he can prove it an unreasonable contract, and it puts the burden of proof upon the Attorney-General.

Mr. LITTLEFIELD. It makes it prima facie reasonable?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. That is, it gives the corporation a prima facie good character as to that contract?

Mr. JENKS. The burden of the proof is on the Attorney-General to prove that the contract is unreasonable.

Mr. LITTLEFIELD. Do you think that facilitates the execution of the law?

Mr. JENKS. In case the Commissioner does think the contract unreasonable, and files his order, then the corporation stands exactly where it does now, and its contract is open to attack by the Attorney-General simply by showing that it is in restraint of trade. He need not show that it is reasonable or unreasonable if it is in restraint of trade. So the provision is simply that this act of the Commissioner of Corporations can accomplish nothing more than to leave the corporation where it is now. If he does not act it puts the corporation into this better position, that, if the contract should be attacked by the Attorney-General, the Attorney-General must prove to the satisfaction of the court that the contract is an unreasonable one.

Mr. LITTLEFIELD. That he has to do now, because he takes the affirmative on every proposition; but your proposition is that that makes a *prima facie* proposition in favor of the corporation. All the Government has to do now is to establish that the contract is in restraint of trade, but this puts the burden on the Government to prove that it is in unreasonable restraint of trade.

Mr. JENKS. Yes.

Mr. LITTLEFIELD. Is this decision of the Commissioner subject to the review of the Commissioner himself? That is, suppose the Commissioner considers this contract which you speak of, and which you expect to have filed, in respect to which the corporation wants a certificate of good character under this bill, giving its operations *prima facie* legality, and the Commissioner makes his decision to-day and declines to hold it reasonable—in other words, he holds it unreasonable—can the same Commissioner of Corporations next week review that case and reach the conclusion that it is reasonable? And if not, why can he not?

Mr. JENKS. You understand if he files no order that it is unreasonable, it is considered to be reasonable.

Mr. LITTLEFIELD. Suppose he files an order. Can he later reconsider the case and reach another conclusion contrary to that which he reached when he filed the order?

Mr. JENKS. I should say that could be done.

Mr. LITTLEFIELD. If that could be done, in case of a change of administration and a change of policy as to what is reasonable or unreasonable, you might have an entirely different determination as to what is reasonable and unreasonable.

Mr. JENKS. That is possible.

Mr. LITTLEFIELD. Take our friends, the United States Steel Corporation; they might get from the Commissioner of Corporations under this Administration a certificate of good character, but if you should have a change of administration and the new administration was inspired by more energetic ideas, perhaps dominated by a gentleman who holds that 35 per cent is an unreasonable amount of a monopoly, you might get a different decision as to unreasonableness.

Mr. JENKS. I will revise the statement I made before and put this position in as the one which I think was the one before the committee. For the moment I did not recall that the Commissioner of Corporations would have his thirty days to consider this matter, as provided in the bill. After that thirty days, so far as he is concerned, that is final.

Mr. LITTLEFIELD. That stands, then?

Mr. JENKS. So far as he is concerned, that stands. But the court would have the power to review.

Mr. LITTLEFIELD. Then, when the Commissioner of Corporations gives his decision, there is no power in the Commissioner, quoad this bill, to withdraw it?

Mr. JENKS. Yes, sir.

Mr. MARBURG. May I suggest that under the order of the President he can call for further information from time to time about that corporation, and withdraw its certificate if its acts are illegal?

Mr. LITTLEFIELD. That does not reach the proposition that the chairman suggested. The question was whether, on the same state of facts, it was in the power of the executive department to revise its conclusions on this proposition and reach a different conclusion. First you thought it was, and now you say it could not do that?

Mr. JENKS. No, sir.

Mr. LITTLEFIELD. Your recollection is that you discussed this in your conferences, and you thought you could not? Having refreshed your recollection, your recollection is that you can not?

Mr. EMERY. I understand your view of the purpose and effect of this act to be that after thirty days have passed and a contract is not decided against, there is a bar to prosecution unless the Federal Government can prove an unreasonable restraint of trade, so far as that particular contract is concerned; is that correct?

Mr. JENKS. Yes, sir.

Mr. EMERY. Does this act thus justify the contract of the particular individual field, or would it justify all contracts identical with that contract made with other individuals; or must he in each case obtain the ruling of the Commissioner? For instance, I can assume, Mr. Chairman, that it would be quite possible, and frequently happens, that a company would make 50 contracts, each with a different person, but all identical contracts. This contract being assumed to be in restraint of trade, if one contract is filed and the Commissioner passes upon it, is the immunity given to all those other contracts which are identical, or is the immunity given to all identical contracts with other persons, or must there be filed a contract with each of those individuals in every case?

Mr. JENKS. That specific phase of it was not discussed in regard to the bill. A contract drawn in identical terms between one party and, we will say, 20 different parties may after all be a contract that is essentially different with regard to its general effect and nature. In one case it might be reasonable and in another case unreasonable. My own personal judgment is that this does not make it clear that each contract should be filed separately, and it should be made clear that each contract should be filed separately; and if 100 different parties to make the same contract, the Commissioner of Corporations would be obliged to look to each contract separately.

Mr. LITTLEFIELD. You mean the number of the parties might alter its effect?

Mr. JENKS. It might be, or it might be that the nature of the contract made with different parties might be different, although it might be the same identical contract.

Mr. LITTLEFIELD. It would be pretty hard for the Commissioner of Corporations to tell what use a man is going to make of a written contract.

Mr. JENKS. The Commissioner of Corporations should also inquire into the circumstances of the contract.

Mr. LITTLEFIELD. Yes, and of course the day after the contract is made the corporation might proceed to violate it.

Mr. JENKS. Under those circumstances they would be open to attack.

Mr. LITTLEFIELD. Yes, they would be; but everybody is doing it now, and I do not think anybody needs any shield.

Mr. JENKS. I do not put it that way.

Mr. LITTLEFIELD. Do you think that any great interest needs a shield, that business corporations need a shield?

Mr. JENKS. Yes, I do.

Mr. LITTLEFIELD. Right on that point, I want to say that this general suggestion or proposition that everybody is doing something that nobody dares to disclose, and that everybody is violating the law, and the secret is so universal, applies so universally to everybody, that nobody dares to disclose it, may impress some people very vigorously, but it does not me.

Mr. JENKS. I should put the proposition in an entirely different way, myself. I have not said personally that people were engaged in illegal acts under the present law.

Mr. LITTLEFIELD. Has it not been so stated in the hearings?

Mr. JENKS. Yes, I think so.

Mr. LITTLEFIELD. Then you will not qualify it?

Mr. JENKS. No, sir; it may not be. I am not closely enough connected with people who are breaking the law so that I can venture to name anybody. But I have already given an illustration of the Michigan salt field, where by making an agreement that is entirely reasonable, or may be reasonable, a very large saving to the public is made in the way of escaping cross freights; and I should say that now, under the present Sherman antitrust act, such a contract is without question illegal.

Mr. LITTLEFIELD. How does that restrain trade?

Mr. PARKER. That was a division of territory between different salt corporations, so that each should have a certain amount and a certain territory?

Mr. JENKS. Yes, sir.

Mr. LITTLEFIELD. The purpose of it was to save the cost of transportation. Now, if that was the only purpose and effect of that division, to save the cost of transportation and lessen the distance the salt was transported, I would like to know how that restrained trade.

Mr. JENKS. In all probability it would save half the amount of the cost of transportation.

Mr. LITTLEFIELD. Did a court decide that that was in restraint of trade?

Mr. JENKS. So far as I remember, the court did not take up that question or settle it.

Mr. LITTLEFIELD. I should like to know how that is, that naked proposition. I heard the Addison Pipe case suggested.

Mr. JENKS. That is a different case. Let me make a statement here. If there has been a transportation of salt back and forth across a State unnecessarily, and a contract of this kind should limit the amount of transportation, I think it is entirely probable that under the present law the agreement, although in my judgment it is en-



tirely reasonable and in the public interest, would be declared in restraint of trade, and illegal.

Mr. LITTLEFIELD. The question of fact was, in case of an agreement for the purpose of facilitating transportation and reducing its cost, and reducing the distance that the product was transported, how that was in restraint of interstate trade.

Mr. JENKS. It would lessen the amount of interstate trade.

Mr. PARKER. Does not the agreement you speak of prevent competition between those two parties in the sale of salt?

Mr. JENKS. In the same territory.

Mr. PARKER. And removes competition in that way.

Mr. JENKS. Yes.

Mr. MALBY. Which might be considered in restraint of trade?

Mr. JENK. Yes.

Mr. MALBY. I say it might be. I do not know.

Mr. LITTLEFIELD. What do you understand to be a contract in restraint of trade, eliminating now for the time being the Sherman antitrust law from your consideration, and speaking now of the common law? What is a contract at common law in restraint of trade? I am not speaking now of the popular acceptance of the word, but as common law authorities define it.

Mr. JENKS. I should suppose, Mr. Chairman, that it would be much better to take that specific definition from the books. I may say, then, with reference to the matter, that, so far as my knowledge of the common law is concerned in connection with that matter, contracts made between individuals that say that one person will do less, or one person will do more, one person will give special privileges to one corporation or will do less business with others in consideration of this contract, and so on, are in restraint of trade.

Mr. LITTLEFIELD. You have plenty of time between now and Thursday of next week to do it, and will you kindly file all the cases that you and your attorneys can find that give that definition, that common-law definition, of interstate trade? I have not been able to reach that result. You may be right, but if you will please file any cases that sustain that definition, I will be obliged.

Mr. JENKS. I would hesitate to give my offhand definition of that.

Mr. LITTLEFIELD. No; but just file all the cases you can.

Mr. JENKS. May I ask if you will put it in this form: To file with you a common-law definition of what is in restraint of trade, with the authorities supporting it?

Mr. LITTLEFIELD. Very well; then file the definition you want to give. This is predicated on sections 1, 2, 3, and 6 of the Sherman antitrust law, and when you import the term "reasonable" of course it is predicated upon the individual attempt to monopolize.

Mr. JENKS. I noticed yesterday a statement made by the chairman which seems to me, if I may venture to say so, inaccurate. In connection with the law, the Sherman antitrust act, I do not understand that all that is forbidden is a conspiracy; and I understood the chairman yesterday to interpret an agreement in restraint of trade and a conspiracy in restraint of trade as identical terms.

Mr. LITTLEFIELD. Is not the language in that bill predicated upon all the language in sections 1, 2, 3, and 6?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. Let me call your attention to this language. The Sherman law uses the language "Every contract, combination

in the form of trust or otherwise, or conspiracy." This language that you want us to put in the law will qualify each of those propositions with the term "reasonable," would it not?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. So that it would say "a reasonable contract," and "a reasonable combination," or "a reasonable conspiracy." Is that right? Would not the language of that bill qualify that term "conspiracy" by the term "reasonable?"

Mr. JENKS. I should say not.

Mr. LITTLEFIELD. Is there anything in your bill that restricts it? I thought your bill applied to all the language in those sections. I may be in error. Just point out where it limits it so that it does not apply to conspiracy.

Mr. JENKS. It says, "unless the same be in unreasonable restraint of trade or commerce." There is no implication that you are trying to force together two such words as "reasonable" and "conspiracy." Under the act as it stands we have this expression "or conspiracy" set off by itself by commas, as if whenever you found a conspiracy it was to be considered illegal. The language is:

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Now, the conspiracy in itself, so far as the definition goes, implies a purpose to do wrong, and implies something unlawful. Until this act was passed a contract or combination in the form of trust or otherwise was not necessarily criminal or illegal.

Mr. LITTLEFIELD. You mean in restraint of commerce?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. Certainly.

Mr. JENKS. So far as a conspiracy was concerned, it was illegal before this law was passed, because it means in the nature of the case an illegal contract or a contract to do an illegal thing. So it seems to me in a discussion of this kind that it is an unfair proposition to try and force these two words together; so that when in our bill we say that in certain circumstances corporations that make agreements that are not considered unreasonable shall not be attacked, it is not to be said that we are undertaking to legalize what is in its nature illegal.

Mr. LITTLEFIELD. If you want to be hypercritical, let us look at the language of your bill. Let us have it right out, here. You say in section 4 "that no suit or prosecution by the United States under the first six sections of the said act," and so forth. Do you mean that language?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. This prosecution extends to combinations in the form of trust and to conspiracies, does it not?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. Now, you say they shall not be maintained, these contracts and combinations, but you leave out conspiracies?

Mr. JENKS. If you find them there.

Mr. LITTLEFIELD. Are they not there?

Mr. JENKS. If they are there they—

Mr. LITTLEFIELD. Are they not there?

Mr. JENKS. The word "conspiracy" is there.

Mr. LITTLEFIELD. Do you not undertake to say that this shall apply to conspiracy? Do you mean to tell this committee, Mr. Jenks, that your language does not undertake to take out the word conspiracy from the operation of this antitrust act?

Mr. JENKS. I should certainly take that position.

Mr. LITTLEFIELD. I wish you would produce your lawyers on that. Mr. Morawetz and others were to file a brief, I think. Ask them to put into their brief for me the reason, when you say that no suit or prosecution by the United States under the first six sections of the Sherman Act shall be begun, and so on, when those sections prescribe conspiracy, why that does not apply to conspiracy. I wish you would have them put into their brief for me the reason that that does not apply to conspiracies.

Mr. JENKS. It seems to me a conspiracy in restraint of trade is in itself unreasonable.

Mr. LITTLEFIELD. In restraint of interstate trade?

Mr. JENKS. A conspiracy.

Mr. LITTLEFIELD. Prior to the antitrust law in restraint of interstate trade?

Mr. JENKS. A conspiracy in constraint of interstate trade is, in my judgment, something that was unlawful beforehand, something that was by virtue of its nature unlawful, in its essential nature unreasonable. But agreements were not unlawful or unreasonable in their nature, necessarily.

Mr. PARKER. Are we not arguing a good deal about the meaning of the word "conspiracy," which has practically the meaning of an agreement, and particularly the meaning of an unlawful agreement; and is it worth while, when words of that sort can be arranged in the bill as you may see fit? I would like very much to have Professor Jenks go on.

Mr. LITTLEFIELD. I understand that you object to this examination I am conducting?

Mr. PARKER. No, I do not object, but I think we have gone far enough in it.

Mr. LITTLEFIELD. I am pretty nearly through with it, and if you had not interrupted I would probably have been through by this time. Is there any difference in meaning between "combination" and "conspiracy?"

Mr. JENKS. Yes.

Mr. LITTLEFIELD. What is it?

Mr. JENKS. A combination may be or may not be in its nature unlawful. A conspiracy must be unlawful.

Mr. LITTLEFIELD. How do you define "conspiracy?"

Mr. JENKS. A conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

Mr. LITTLEFIELD. That is a correct definition.

Mr. JENKS. And when we speak in this bill of giving under certain circumstances immunity from prosecution for contracts that are not in their nature unreasonable and in restraint of trade, we are not legalizing conspiracies. It is simply a matter of words. We do pretend to say that an agreement, if it is not unreasonable, may be car-

ried out, and it does not seem to us possible that a conspiracy that is in its essential nature illegal can be reasonable.

Mr. LITTLEFIELD. What is a reasonable combination in the form of a trust or otherwise that is in restraint of trade, that the Commissioner of Corporations would authorize under this act?

Mr. JENKS. The question you are putting now I think has been asked in a different form before, when the question was asked of some of the other gentlemen here as to the theory on which the Commissioner of Corporations would go in making up his mind as to whether things were unreasonable or reasonable. I think I should have to answer that question in much the same way. There are many decisions of the court determining the meaning of the words "reasonable" and "unreasonable," and I should suppose that the Commissioner of Corporations, when a case of this kind came up, would endeavor to interpret the meaning of the words "reasonable," and "unreasonable" in the light of these various decisions that have been found in many of these cases.

Mr. LITTLEFIELD. Is it your idea that it would be practicable that we should put into a statute the legal standard of the words "reasonable" and "unreasonable?"

Mr. JENKS. I should think you would have to. On the other hand, I should think that it would not be difficult for the courts to determine what would be reasonable and what would be unreasonable, because they have been doing so for centuries. I took occasion after the hearing on Saturday to look into Bouvier's Law Dictionary and the American and the English encyclopedia of law, and I found in the American and English encyclopedia of law 25 solid pages of matter determining the definition of the word "reasonable," and it seems to me there is no difficulty in getting decisions by the hundred to determine the meaning of the word "reasonable." Now, the word "reasonable" in the citation is used in a hundred different ways. There is reasonable doubt, and it is used in many other connections. But the word "reasonable" is not only one that has been used in everyday language, but it is a legal term that has been used in the English courts and in the American courts, and which has its application so defined that I think we should not have any serious difficulty in having the court determine whether certain agreements were reasonable or unreasonable.

Mr. LITTLEFIELD. You have not yourself any opinion as to how it would be applied under these circumstances?

Mr. JENKS. In here?

Mr. LITTLEFIELD. Yes.

Mr. JENKS. I should say it would be unwise, and perhaps impossible, to give a definition offhand. I very unwisely attempted to give a definition offhand in another instance to-day, and it was a very unwise falling into—I will not say a trap—because the chairman is incapable of that.

Mr. LITTLEFIELD. Oh, no.

Mr. WASHBURN. May I interpose to say that in the case *In re Green* (52 Fed. Rep., 118) this very question is considered in connection with a combination involving distilleries, and a great number of citations are given on this very question.

Mr. JENKS. I have here, offhand, several cases where that word "reasonable" and the word "unreasonable" came up, but it does not seem to me to be worth while to cite them now. May I venture to quote a sentence that has just been handed me on that subject? This reads:

It is not always true that competition is the life of trade, for it often may be the ruin of business, and this fact has been recognized by the courts.

This, then, was the law in this country from the earliest times, and it may be briefly stated as follows:

That the validity of contract restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or nature and inevitable effect of the contract was to suppress competition or create a monopoly, it was illegal; if a contract imposed a restriction that was unreasonably injurious to the public interest or a restriction that was greater than the interest of the party in whose favor it was imposed demanded, it was illegal; but contracts made for a legal purpose and which imposed no heavier restraint on trade than the interest of the favored party required had been uniformly sustained, notwithstanding their tendency, to some extent, to check competition.

That is a general statement from a speech in Congress by Hon. Charles G. Washburn.

I have here various citations, and if you like I will file citations as to the meaning of the word "reasonable."

Section 11 is practically the same thing applied to railroads. I wish to take up section 7, with reference to triple damages. I suppose that when the Sherman Act was passed provision for triple damages was imposed largely on account of the popular apprehension that there was very grave danger, such as there is in connection with these great corporations, and it was thought that if threefold damages were imposed it would tend to check the growth of these great corporations. The suggestion is made to remove this provision for triple damages and simply to provide for recovery of the damages sustained and the costs of suit, including a reasonable attorney's fee—which is different from the common law, inasmuch as it takes away the punitive damages. That, I think, is true. Punitive damages are imposed, of course, under certain circumstances under the common law; but usually the reason for punitive damages is that there is some case of flagrant or outrageous fraud, or there is some apparent intent on the part of the person who is committing the injury to hurt, beyond a mere matter of money damage, the person that is damaged.

Mr. LITTLEFIELD. Is it not predicated in the main on the theory that the injury is malicious?

Mr. JENKS. That is it, that the injury is malicious. Now, so far as the provision here is concerned, I will say that generally speaking the imposition of punitive damages under ordinary circumstances where there is no malicious intent would be wrong, and it is not good policy. Now, under the Sherman law people may make contracts, usually in their own interests, with no particular thought of hurting anybody else, and at the same time they may hurt other people, and if so they would be mulcted in triple damages. It seems to me they should pay the actual damages, but there is no reason why they should have punitive damages imposed upon them. There might be cases where that is true, but ordinarily not.

Mr. LITTLEFIELD. Would it not be true, as a rule, where you would get injury to a private individual that would be the result of a deliberate purpose to injure?

Mr. JENKS. No; I think not. Take the case cited yesterday, the English case of the Mogul Steamship Company. That case was upheld on the ground that the contract was made primarily in the interest of parties concerned and not to injure other people, although it did result in injury to other people. It was the intent that determined the matter. So I should say that where contracts are made that would be considered on the whole reasonable, they may perhaps injure other individuals, private individuals, but the intent is not such. Take the case I have spoken of, as to the shipment of salt. It might readily be that some railroad would be injured by having less salt to transport, but certainly there should be no special damages inflicted in that case. Under the present circumstances, where triple damages are imposed, there is at any rate a strong possibility of those triple damages being used for the purpose of inflicting private vengeance; so I think that the Sherman antitrust act is a very dangerous act under the present circumstances in permitting triple damages. A proceeding that is not injurious and with no evil intent nevertheless may be pressed so that punitive measures may be taken and triple damages enforced. I think that is very wrong. In this statement (prepared by Mr. Emery) the other day it was intimated that this bill if passed would take away from private individuals the vindication of the law by preventing them from recovering triple damages. I think most people who bring suits for triple damages are not much concerned with vindication of the law. I think we should not let companies that may be smarting under the sting of a defeat have the opportunity to use unjustly, as it may be, this right of action for triple damages. On the other hand, there may be cases where there would have been the distinct purpose of injuring them.

Mr. LITTLEFIELD. What do you think in the case of a boycott?

Mr. JENKS. We think that under the circumstances triple damages are contrary to public policy, and that provision should be taken out.

Mr. LITTLEFIELD. How about a boycott; is there an intent to injure there?

Mr. JENKS. Before I give any definite opinion as to boycott, I should like to have the word "boycott" defined, because, so far as I know, "boycott" means two or three different things. If boycott means simply that I am not going to buy from a person, for any reason whatsoever—and that is all it means in some cases—I think there is nothing wrong about that; and if I should say to a friend of mine, "That is a contemptible fellow to deal with," and show him that he is, and that he or I should deal with some other man because we prefer to deal with him, I see no objection to that. On the other hand, if I go to a third man and say to him, "If you deal with that man, I am going to injure you in some way," that is wrong and is punishable. The word "boycott" has these different meanings, and, so far as that is concerned, the committee that is supporting this bill has not intended anywhere in the bill to attempt to legalize the boycott, as the word boycott has been generally used and as the word boycott has been generally defined by the court. So far as our purposes here are concerned on that point, I think it is sufficient to say that this committee has not intended to legalize the boycott; and if the bill in the judgment of your committee does legalize the boycott, I think they should make provisions so that it should not do so.

Mr. LITTLEFIELD. The character of boycott to which I shall call your attention is the one passed upon by the Supreme Court in the Loewe case. Have you seen that case?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. And have you read it?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. Do you think under the circumstances of that case there was no active intent to injure the plaintiff, or was it not saturated with the distinct purpose of destroying the business of the plaintiff?

Mr. JENKS. On that specific case let me say again we are now, at any rate, living and acting under the Sherman antitrust act. I should not venture to express a judgment on a point that the United States Supreme Court has passed upon in that way. It would be simply an individual judgment. But in the case I have cited—the Mogul Steamship Company case—there was injury done. It was doubtless conscious on the part of the company making the contract that injury would be done, and at the same time the primary purpose was their own benefit, as the court said. Speaking not as a lawyer or as a person rendering a decision, but as a person who would like to see a question of that kind rightfully settled, I think the question is still open, whether in the case of the so-called boycott there in the Loewe case the intent was primarily to injure, or whether the intent was to secure what people believed to be their dues and their rights, even though in the securing of those rights and those dues injury had to be inflicted upon other people. It is a question there whether we are to impute maliciousness even when people do injure others in the attempt to secure their rights. I am doing my best to be perfectly fair about this.

Mr. LITTLEFIELD. Are you in favor of their being allowed to conspire and combine to secure their rights, to destroy the business of another person?

Mr. JENKS. I am not in favor of their being allowed to conspire.

Mr. LITTLEFIELD. To combine?

Mr. JENKS. Nor to combine if the word "combine" is to be pushed to the extent of injuring other people wilfully. I am not in favor of having the law permit people to directly threaten other people in order to get through a purpose of that kind.

Mr. LITTLEFIELD. Now, you are familiar with this Danbury hat case?

Mr. JENKS. Reasonably so. I have read the decision.

Mr. LITTLEFIELD. What I wanted was an answer to the concrete question whether or not you think, under the circumstances disclosed in that case—

Mr. JENKS. I should prefer not to express an opinion upon that.

Mr. LITTLEFIELD. Very well.

Mr. JENKS. For the reason that I have already expressed as much of an opinion as I care to. I am not expressing an opinion contrary to that of the Supreme Court in that case or any other. I do not understand that the Supreme Court settled the point in that case. They simply said that labor unions were under the Sherman Act. The question of the boycott is still pending. As I understand, the Supreme Court of the United States has not yet definitely and clearly defined a boycott under circumstances of that kind; so I do

not care, where I am held to a strictly legal meaning of the word, to express an opinion of that kind when a decision of the Supreme Court may decide the thing in a few weeks. But it is possible that the primary purpose of the laborers was not a malicious injury of others, but the securing of their own rights, even though the injury was done. With the same frankness I think that the employers, in the action they take in many cases, are simply endeavoring to obtain their own ends and to secure their own rights, even though there may be irreparable and very great injury done to the laborers. I think we ought to recognize in these disputes between employers and employees that there is often very great feeling. The prime purpose is to secure their own rights, and they are careless of the effect on others. We ought to be rather cautious about imputing malicious intent to either side.

Mr. LITTLEFIELD. Take a case of a combination to destroy the business of an employer for the purpose of reaching what otherwise might be a legitimate result. Now, assume that. I do not say that it is correct; I do not say that that is this case; but assume that there was a combination of that kind for the purpose of destroying the business of a man in order to get a raise in wages or in order to get him to comply with what was thought to be by the men a perfectly reasonable proposition.

Mr. JENKS. I am trying to speak with perfect frankness, and I should say that a case of that kind is an assumption so contrary to human nature that I believe it is practically impossible. I say this, that there might very easily be a combination between employees to, for the time being, say, check the business or stop the business of an employer temporarily, so as to force him to give them higher wages; but the idea of destroying the business would be so contrary to their own interests that I do not think that would be possible.

Mr. LITTLEFIELD. Can you conceive of a boycott that is malicious in its character?

Mr. JENKS. I can conceive of certain specific cases where the employees would be so enraged, so unreasonable, that they would be malicious in their attacks, and in a case of that kind I think they should be punished.

Mr. LITTLEFIELD. In that case there would be a malicious injury—I am not saying that it has occurred; and do you think that the plaintiff ought to be authorized under those circumstances to sue for and recover punitive damages in the ordinary course of the common law, or ought he not?

Mr. JENKS. I should have no objection to that.

Mr. LITTLEFIELD. This provision you have here would eliminate that possibility.

Mr. JENKS. In this case it would. While I think on the whole this is more likely to secure justice than the common-law rule, under the present circumstances in this country to-day, with the feeling that there is between employers and laborers, whatever the common-law rule would be, I have no objection to putting in the common-law rule myself.

Mr. LITTLEFIELD. That is, it would make it unlimited?

Mr. JENKS. It would permit punitive damages.

Mr. LITTLEFIELD. The amount assessed under those circumstances could be unlimited?



**Mr. JENKS.** Yes; but I should be decidedly opposed to leaving the provision for triple damages under any circumstances.

**Mr. LITTLEFIELD.** To what extent has that statute been abused in the eighteen years that it has been in effect? It has been in effect since 1890. To what extent has that been abused? I do not mean to say that is the final test, but it is entitled to some weight.

**Mr. JENKS.** Yes; the point has been made that this act has not been very rigorously enforced; but I think it is true that there is, both on the part of the Government and on the part of private individuals, a tendency, a feeling just now, to push it, and I think now is the time to stop it, simply on account of that. I am inclined to think that the tendency on the part of private individuals to push these triple damages is decidedly greater than it ever was before, and I think the consequences might be serious.

**Mr. LITTLEFIELD.** What is the effect of your section 3, which follows right after section 7?

**Mr. EMERY.** Professor Jenks alluded to a circular of myself, and I think he misstated what I said. May I trouble him to read this [handing paper to Mr. Jenks]?

**Mr. JENKS.** This reads:

The vindication of the law by private individuals is discouraged by preventing them from recovering triple damages, that, in most cases, would cover the cost of their litigation; and improper combinations are encouraged by the lessening of the money penalty likely to be recovered from them.

I think that should go into the record.

**Mr. LITTLEFIELD.** What do you understand to be the effect of the language used in section 3, which reads as follows:

SEC. 3. That in any suit for damages under section 7 of the said act approved July 2, 1890, based upon a right of action accruing prior to the passage of this act, the plaintiff shall be entitled to recover only the damages by him sustained.

Does that affect pending litigation?

**Mr. JENKS.** No, sir; it can not affect pending litigation.

**Mr. LITTLEFIELD.** Take that section right there, alone; does that affect pending litigation?

**Mr. JENKS.** That can not stand alone, because this last section says: "Anything herein contained to the contrary notwithstanding."

**Mr. LITTLEFIELD.** I suppose we can proceed on the intellectual and theoretical hypothesis that section 3 does stand alone. There is no physical or mental impossibility in assuming that it stands alone, is there?

**Mr. JENKS.** No; as a sort of mental gymnastics.

**Mr. LITTLEFIELD.** As it stands alone, does it or not affect pending suits?

**Mr. JENKS.** I should say, Mr. Chairman, that any answer to that question is impossible, and it would certainly be misunderstood. I will say that there is nothing in this bill to affect pending suits.

**Mr. LITTLEFIELD.** Now, as a matter of kindness, do you mean to say that that is an ingenious answer to my question?

**Mr. JENKS.** Yes.

**Mr. LITTLEFIELD.** Very well; we will leave it right there. Now, why do you legislate the Danbury Hat case out of court in section 3, and legislate it back again in section 4, if that is your purpose? You

see it would legislate them out if you did not provide for it in section 4. What is the purpose of legislating them out and then in again?

Mr. JENKS. I am not aware that it does anything of the kind.

Mr. LITTLEFIELD. Would they be out under the provisions of section 3, if you did not have the peculiar and very unusual provisions (I undertake to suggest) of section 4? Would they be out if it was not for the provisions of section 4?

Mr. JENKS. I do not understand that the Danbury Hat case is out.

Mr. LITTLEFIELD. Would it be out if it were not for the saving provisions in section 4? Is not that question clear? Quoad its right to civil damages, would not the Danbury Hat case be out under section 3, if you did not put it back in under the provisions of section 4? I do not undertake to say that I appreciate the force of your language.

Mr. JENKS. That thought had never occurred to any member of the committee. I am sure, that we were in any way affecting any pending suit by any provision of this bill, anywhere.

Mr. GOMPERS. May I just call attention to this last provision of section 3, beginning on line 19, after the semicolon:

And no suit for damages under said section 7 of the said act, based upon a right of action accruing prior to the passage of this act, shall be maintained unless the same shall be commenced within one year after the passage of this act?

Mr. LITTLEFIELD. That does not relate to the proposition I had in mind, at all.

Mr. GOMPERS. That would not affect the Loewe case.

Mr. LITTLEFIELD. It would not affect the Loewe case? When you say "in any suit for damages," I suppose "any" means "any," does it not?

Mr. JENKS. It does not, as it is afterwards qualified.

Mr. LITTLEFIELD. That is exactly my point. It means any suit now pending or hereafter to be brought. In the last part of section 4, as I infer from what you say, you were endeavoring to provide against the operation of that provision. What I want to know is why you in effect legislate them out, quoad the right of damages, in the last part of section 3, and legislate them back in the last part of section 4. Of course if you did not have it in mind at all—

Mr. JENKS. The question was never raised in the committee, and in section 3 it was made as direct as possible. We might have said "excepting pending suits for damages," and we would have no objection to having it put in, but in writing the bill we attempted to make it as simple as we could, considering the complicated nature of the subject.

Mr. LITTLEFIELD. That would have eliminated all the necessity for this indefinite language on the tail end.

Mr. JENKS. There was no purpose in it.

Mr. LITTLEFIELD. Whose work is that last paragraph of section 4? Who prepared that language? Did you prepare it yourself, or did your attorneys do so?

Mr. JENKS. I should say that that last part of section 4 had passed through at least half a dozen different forms in about as many bills. I know I wrote one, and Mr. Stetson wrote one. I am not sure about the others. In certain cases two or three of us were together, and

each would suggest a form. In the specific form here, I have not any idea who is responsible for it. But there is this thought from the first draft that was made along this line, and that was something that there was no change of opinion upon whatever, that pending suits must in no way be touched. There was absolute unanimity on that, from beginning to end.

Mr. LITTLEFIELD. You would concur in any amendment which eliminates that question?

Mr. JENKS. Absolutely.

Mr. MALBY. As to pending suits?

Mr. JENKS. Yes. If I may venture to be personal about this, inasmuch as the Commissioner of Corporations had his name mentioned here, and several other names have been mentioned, I remember speaking with some of the gentlemen, and they said, "I hope there will be nothing likely to be done that will affect pending suits," and I said, "So far as I am concerned and so far as I know, there is no thought of affecting pending suits." It has always been assumed.

Mr. LITTLEFIELD. I did not know but there was some purpose in it that I did not discover.

Mr. JENKS. Is there anything more in that section?

Mr. LITTLEFIELD. That could all be reduced to about one line, instead of ten lines, in the bill. On that point is it your judgment that the language of section 3 would, in fact, authorize a boycott under the Sherman antitrust law?

Mr. JENKS. I think not. It was not intended to legalize the boycott or the black list, and I do not think it would.

Mr. LITTLEFIELD. When you authorize a strike for any cause, does not that cover all causes? Suppose they undertake to injure the business of any person, if you authorize the strike for any cause, does not that do that?

Mr. JENKS. It does not seem to me it does, but I think the easiest way to dispose of that is this: If, in the judgment of the committee, that paragraph authorizes the boycott in the way we have been speaking of it, a malicious attack, I hope the committee will amend the section.

Mr. LITTLEFIELD. The better way would be to redraft the whole section, rather than leave it open to uncertainty.

Mr. JENKS. Yes. On the other hand, I think it should be made perfectly clear that a strike should be permitted. I may say that my own personal opinion is that, under the present law, a strike is admissible and is legal and that no employer is compelled to continue the employment, on the other hand, of any one of his employees. I think the right to strike and the right to discharge employees should be unimpaired. I think that is so under the present law, and if it is not it should be made clear in this bill.

Mr. LITTLEFIELD. At any rate, that is as far as you want to go?

Mr. JENKS. I know this is true, that the feeling on the part of laboring men is so apprehensive lest under the present law they are forbidden the right to strike that I think should be put in this bill to make it clear that they do have the right to strike.

Mr. EMERY. Do I understand you to hold that a strike for any cause that obstructed or impeded interstate commerce would be lawful?

Mr. JENKS. Would you perhaps define what you mean by a strike? I do not see how I can answer your question unless you define what you mean by a strike.

Mr. LITTLEFIELD. I did not get the question clearly.

Mr. JENKS. I would like to have Mr. Emery define what he means by a strike.

Mr. LITTLEFIELD. I will ask Professor Jenks if he thinks the bill ought to be changed so as to authorize the strike as one of the instruments of carrying out a conspiracy in restraint of trade.

Mr. JENKS. I think I will have to make a distinction that the chairman has made at different times. A strike, as I look at it, is a specific act of withdrawing the service of men. Now, that should be permitted. I question very much whether you can go further and determine the specific purpose there, but I will say this, that I have myself no objection, and I am sure that the committee has no objection, to inserting the clause in that possibly under the common law—

Mr. LITTLEFIELD. That puts it altogether out of the operation of the Sherman antitrust law. Here is the proposition: As the law stands to-day, I do not suppose it would be lawful for the employees to engage in a strike as a part of the carrying out of a conspiracy against interstate trade, or a conspiracy to injure the business of another. As a part of that conspiracy, suppose a strike should be ordered. Do you think it ought to be authorized?

Mr. JENKS. As a part of the conspiracy? If you will withhold the "conspiracy." If you assume that "conspiracy" and "agreement" mean the same thing I should not agree with you.

Mr. LITTLEFIELD. Of course we have that point of distinction there upon which we quibbled before: but the right per se to injure a man's business, which is the phase where the proposition comes up under the law, the right per se may be one thing, but the strike as the most effective means of carrying out a conspiracy to destroy the business of a man engaged in interstate trade is not permissible.

Mr. JENKS. I should say that a strike of that kind is unthinkable. A strike is for the purpose of increasing wages or bettering conditions of employees.

Mr. LITTLEFIELD. Yes; perhaps so; but supposing it is a part of the purpose to destroy the rights of the man against whom the strike is made until that increase in wages is made, it would be an interference with their right to engage in business until the increase in wages is made. Do you think it ought to be permissible, as a part of the carrying out of that purpose?

Mr. JENKS. I should say yes, without any hesitation, that employees who have the right which I think they now have recognized, of withdrawing their labor from their employer in order to secure an increase of wages and better conditions of labor, or anything of that kind, even though for the time being that does injure their employer and does also restrict or restrain interstate commerce. And I say that for this reason, that I do not think that under the present condition of society it is possible for laborers to secure their just rights and wages in many cases unless they are granted the privilege of acting in a strike in order to accomplish their purpose. Now, if they do strike in order to secure this increase in wages, and if thereby

their employers are temporarily injured, I think that is not a sufficient reason to impute a malicious intent to them.

Mr. LITTLEFIELD. That is not the whole of the hypothesis I gave you. Suppose, as a part of the purpose, they deliberately engage in a conspiracy to deprive the man against whom the strike is ordered of his right to engage in business and his right to trade with his fellows?

Mr. JENKS. When you use the word "conspiracy" I agree with you, because the word "conspiracy" implies illegality. I do not think they should do, and under the law I do not think they are permitted to do, illegal and criminal acts, and in my judgment there is nothing criminal and there is nothing illegal (unless by specific statute, and if so the statute ought to be changed) in their stopping work, even though the stopping of the work does injure other people. If they go further and attack others who take their places and commit crimes they should be punished rigidly for that.

Mr. LITTLEFIELD. In the Danbury hat case they not only stopped work, but they went around in other sections to get other people to stop work and to get others to stop trading with these manufacturers.

Mr. JENKS. That is entirely beyond anything that is in the definition. That is not a strike. That is going beyond a strike. So far as the strike is concerned—the stopping of their work for other people—that should be made perfectly clear.

Mr. LITTLEFIELD. Yes; but if the strike is a part of the combination I refer to, should it be unlawful?

Mr. JENKS. I do not think a strike is possible to be made a part of that. So far as I know, in this section the committee did not intend in any way to authorize any boycott that is illegal—to authorize a boycott as it has been understood. It does intend to authorize a strike. We make the distinction between the boycott and the strike, as I understand the chairman does not.

May I say further on this, with reference to this right of suit—

Mr. LITTLEFIELD. I suppose this language would suit you, then: "A strike that is not in pursuance of a combination or conspiracy in restraint of trade may be authorized?"

Mr. JENKS. No; I should not agree to that.

Mr. WASHBURN. "In unreasonable restraint of trade?"

Mr. LITTLEFIELD. An unreasonable conspiracy.

Mr. WASHBURN. No; in unreasonable restraint of trade.

Mr. LITTLEFIELD. A strike that is not in pursuance of a conspiracy should be authorized; do you agree to that?

Mr. JENKS. Yes; if you do not use the word "conspiracy."

Mr. LITTLEFIELD. We could stop right there and leave out the rest of this section.

Mr. JENKS. I should have no objection to that.

Mr. LITTLEFIELD. Of course there are a lot of fine distinctions involved in this, but you do not want to be responsible for any legislation that would open up the possibility of a conspiracy against trade?

Mr. JENKS. When you use the word conspiracy, you imply illegality.

Mr. DAVENPORT. Would you say any boycott that is forbidden by the common law?

Mr. JENKS. I have no objection, as I said before, to this statement; means that are not unlawful under the common law.

Mr. DAVENPORT. Any boycott is unlawful in common law. Do you wish to have it legalized by Congress?

Mr. JENKS. I have said this, that so far as this bill is concerned I think there is no question about the feeling of the committee on this matter. There is no intent to legalize a boycott; but the strike and the boycott are two entirely different things. We did intend to make it clear that a strike was legal. We think it is so now. But in order to be sure, and in order to remove the just apprehensions of so many people, we want to make it clear.

Mr. LITTLEFIELD. The only purpose you have here is to more adequately express, to express in more perspicuous language, what you think the law is to-day?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. And it is also true that you do not think it would be prudent to go beyond that?

Mr. JENKS. I think it is not the intention of the committee to go beyond that.

Mr. EMERY. May I ask you if you are familiar with the definition and distinction laid down in the report of the Anthracite Coal Strike Commission, between primary and secondary boycott? I had intended to bring that here. You are familiar with it?

Mr. JENKS. I have not read it for two or three years, but it is my impression that it is the secondary boycott that seems to be wrong; but if you can let me have that language here, I should like to have it.

Mr. LITTLEFIELD. Here is a copy of the report. Here is one illustration:

In several instances tradesmen were threatened with a boycott—that is, that all connected with the strikers would withhold from them their custom, and persuade others to do so, if they continued to furnish the necessities of life to the families of certain workmen.

I think in a general way he defines it as a combination, or perhaps a conspiracy. I do not think, myself, that there is a very great deal of difference between the two propositions. They mean substantially the same thing, although conspiracy may import crime.

Mr. JENKS. That is the distinction; but it is a combination to require some person to do something against his will. I think that language "compulsion against his will" is not sufficient. You should go further than that and imply a damage.

Mr. LITTLEFIELD. Do you mean physical damage?

Mr. JENKS. Not physical damage, but monetary damage, to compel him to take action against a third party.

Mr. LITTLEFIELD. That is monetary damage, depriving him of his customers.

Mr. JENKS. If you are going to threaten a third party, that unless he withdraws his trade you are going to injure him, you are getting into bad public policy.

Mr. EMERY. I believe this language is that of Judge Gray, the president of the Anthracite Coal Strike Commission:

What is popularly known as the boycott (a word of evil omen and unhappy origin) is a form of coercion by which a combination of many persons seek to work their will upon a single person, or upon a few persons, by compelling others to abstain from social or beneficial business intercourse with such person or persons. Carried to the extent sometimes practiced in aid of a strike, and as was in some instances practiced in connection with the late anthracite strike, it is a cruel weapon of aggression, and its use immoral and antisocial.

To say this is not to deny the legal right of any man or set of men, voluntarily to refrain from social intercourse or business relations with any persons whom he or they, with or without good reason, dislike. This may sometimes be unchristian, but it is not illegal. But when it is a concerted purpose of a number of persons not only to abstain themselves from such intercourse, but to render the life of their victim miserable by persuading and intimidating others so to refrain, such purpose is a malicious one, and the concerted attempt to accomplish it is a conspiracy at common law, and merits and should receive the punishment due to such a crime.

That later is termed by the learned judge a secondary boycott, in opposition to the other.

Mr. JENKS. That is the distinction I had in mind; when it goes to the length of intimidation of a third person. That is the distinction I had in my mind.

Mr. EMERY. May I ask whether it is your judgment, and so far as you know the purpose of those concerned in the collaboration on the authorship of the bill, not to say anything to legalize the boycott in interstate commerce?

Mr. JENKS. That is, the secondary boycott.

Mr. MARBURG. There seems to be a confusion in the minds of a number of the gentlemen engaged in this matter in the questions that have come up with regard to the operation of this bill as legalizing boycott and conspiracy. As I take it, this bill legalizes nothing. We interfere with none of the rights that lie under the common law for damages. This bill modifies the Sherman antitrust law. The Sherman antitrust law interferes in no way, if I am right, with rights under the common law. This imposes an additional penalty to that of the common law, and it is those penalties additional to the common law which it is proposed to modify.

Mr. WASHBURN. The gentleman must be entirely in error. The construction of the Sherman antitrust act by the decision of 1897 does entirely revolutionize the application of that law.

Mr. LITTLEFIELD. Perhaps the gentleman would more fully appreciate the situation if I should say that the Sherman antitrust law is, properly speaking, an effort of the legislature to apply to the situation the common-law principles, and in the absence of the Sherman antitrust law there would be no Federal prohibition. There are no Federal common-law crimes, and if it were not for the Sherman antitrust law, there would be no offenses against the Federal Government, because there can be no offenses against the Federal Government without an affirmative statute; and when you repeal any prohibition of the Federal statute, of the Sherman antitrust law, you by inference authorize it. The common law does not interfere at all.

Mr. MARBURG. Would not a recovery lie in State courts?

Mr. LITTLEFIELD. Oh, no. The Sherman antitrust law does not now, and it could not, have any reference to that.

Mr. MARBURG. If injury followed from a strike, would not an action for recovery lie in the State courts?

Mr. LITTLEFIELD. Exactly the same as before. But this remedy here, in order to be available to the suitor, must be given by the Sherman antitrust law, and if it is modified to that extent to relieve or remove the remedy, it indirectly authorizes what it prohibited. That is the sense in which it is used.

Mr. DAVENPORT. I must respectfully dissent from that construction of the legal situation, and at the proper time I shall want to discuss

the effects of writing into the Sherman law these provisions that are in here.

Mr. LITTLEFIELD. What is the proposition you dissent from?

Mr. DAVENPORT. That the passage of the Sherman antitrust act, or the passage of this act with the alterations in the Sherman antitrust act, would not affect at all the right of the parties to sue at common law for a remedy. That is a proposition that is absolutely untenable.

Mr. LITTLEFIELD. That is a very interesting question, and we would be glad to hear you on that proposition. Personally I would like to see just how far the Federal Legislature can interfere with the State legislature or with the common-law principles.

Mr. DAVENPORT. Of course, we understand that the power of Congress over this matter is confined to the regulation of interstate commerce, but as to that subject the power is plenary and exclusive, and when the Federal law provides that such and such things shall not be illegal, then that wipes out the State legislation. You must have considered that subject in the very grave measure you had up to-day on the floor of the House. But, as I say, when the proper time comes I shall want to discuss that.

Mr. LITTLEFIELD. I labor under the impression that I have considered it, and I should be very glad to hear the gentleman on it when the time comes.

Mr. DAVENPORT. Of course there is no Federal law, and when Congress undertakes to legislate on the subject and make provisions in regard to that covering the subject, that is the law of the subject.

Mr. LITTLEFIELD. The gentleman will, no doubt, be prepared later on to show us what affirmative State legislation affecting these matters criminally is repealed by the Sherman antitrust act, and also to show us what common-law rights that the individual has have been or will be impaired by the Sherman antitrust act. That is a perfectly open question, and we will be glad to hear the gentleman later on.

Mr. JENKS. Shall I continue? I think there is one point more.

Mr. LITTLEFIELD. Yes.

Mr. JENKS. With reference to the bringing of suits, and damages, it would seem to us with reference to what may be called the immunity clause that it was very desirable at the present time to remove from business men the apprehension of attack under this Sherman Act for agreements that they might have made or might make that they thought to be reasonable. So the provision has been made here that no suit or prosecution under the first six sections of the act would be begun under any contract or combination, unless the same be in unreasonable restraint of trade. We felt that, so far as the Federal Government itself was concerned, that should take effect immediately; so that unless the suits had been begun, the people might feel that any contracts they might have made before, even though they were in restraint of trade, if they were reasonable, should stand. So far as private individuals were concerned, we felt that the situation was quite different. Private individuals may have been injured, and they should have the right to recover damages for an injury. Moreover, it is quite probable that it would be unconstitutional, even if it were desirable, to attempt to cut off the right of private individuals from getting damages now. As I say, it was not considered desirable



to do that anyway, and it would have been unconstitutional, probably, if it had been attempted. It was thought the wise thing to do to provide a statute of limitations which might be short, so that there might not be too much apprehension or too long a time for attacks along this line, but at the same time long enough so that all just causes could be brought and pushed through to a conclusion; so that a provision was made that if this act was passed the Federal Government should not bring any suits unless they were prepared to prove that the contracts or agreements were unreasonable. So far as private contracts and agreements were concerned, they could bring suit in a year. I think that covers practically all of the points in the bill. We recognize fully that the bill is by no means a perfect bill. A great many of us have been working on it, and we believe that it was the best we could do. We believe that it is a practicable bill, although there may be minor amendments to be made here. We have tried to provide for what is reasonable and practicable, to secure a considerable amount of publicity, the more the better, because we think that is a remedial action, and we believe that amendments of this nature to the Sherman Act are very sadly needed. There is perhaps no other action which could be taken by Congress which would so greatly improve business conditions at the present time as this. We think, in addition to that, that it would be a bill that would promote justice among business men and workingmen.

Mr. WASHBURN. Did your committee consider at all making the simple change in the existing act by inserting the word "unreasonable?"

Mr. JENKS. Yes.

Mr. WASHBURN. Was there much discussion of that proposition?

Mr. JENKS. Yes. I may perhaps say that the first thought of that committee was to provide not one bill, but three bills, first separating the common carriers distinctly from others, and putting them distinctly under the Interstate Commerce Commission, and the others under this; the second one just inserting in the law itself that word "unreasonable" wherever it became necessary, and stating that provisions might be made along that line legalizing practically reasonable agreements, and imposing penalties on others. Then there came in this further thought also, which we thought was very desirable to be carried out, and that is, that we get a much greater degree of publicity in regard to these great corporations than we have now. Then we thought it was necessary to go further and make that publicity a condition of giving the release from the Sherman Act.

Mr. WASHBURN. Is that your only reason for preferring the provisions of this bill as it touches the class of business combinations we are talking about, that it insures greater publicity in regard to the affairs of the corporation, and so on?

Mr. JENKS. That is the main reason.

Mr. EMERY. I want a little light on the fourth section, which reads:

That no suit or prosecution by the United States under the first six sections of the said act approved July second, eighteen hundred and ninety, shall hereafter be begun for or on account of any contract or combination made prior to the passage of this act, or any action thereunder.

I wanted to inquire further what was the meaning of that language, "or any action thereunder;" whether it would apply to a conspiracy

as the result of any contract or combination, or to any effect, criminal or otherwise, produced by the contract or combination.

Mr. JENKS. The word "action" applies to "contract or combination."

Mr. EMERY. That is, does it mean anything done by the combination?

Mr. JENKS. That is what it means.

Mr. LITTLEFIELD. It means anything done in pursuance of the contract?

Mr. JENKS. Yes; it means that the suit or prosecution shall not be begun by reason of any action under any such contract or combination, any act that they themselves may have performed under the contract or combination.

Mr. EMERY. Was it your purpose in that section to give complete immunity against both reasonable and unreasonable combinations in restraint of trade, that may not be proceeded against between the time of the passage of this act and one year thereafter?

Mr. JENKS. I fail myself to see that word you are speaking about in section 4. It says: "No suit or prosecution by the United States \* \* \* shall hereafter be begun."

Mr. EMERY. It says:

That no suit or prosecution by the United States under the first six sections of the said act approved July 2, 1890, shall hereafter be begun for or on account of any contract or combination made prior to the passage of this act.

Now, if this act passed to-morrow and became a law, then one year from this date no action for any restraint of interstate commerce by any combination, or as the result of any contract presently in existence, would be the subject of criminal prosecution by the Government of the United States, although there might be no complaint against it, or the crime might not be discovered until after the expiration of the one year.

Mr. LITTLEFIELD. What is the present statute, three years?

Mr. JENKS. I do not recall what it is.

Mr. EMERY. It is a Federal statute.

Mr. LITTLEFIELD. Do we not have a provision of Federal statute that limits criminal prosecutions? What is the limit as to general criminal prosecutions?

Mr. SCHULTEIS. The statute of limitations runs no higher than six years in the various States. In Mexico it is eight years. In the District of Columbia it is similar to the Federal law, which is three years.

Mr. EMERY. I wanted to know whether the gentlemen in framing this bill had in mind the present statute, if there was one, and I wanted to know why there was this exception.

Mr. JENKS. I think the thought was merely this, that it was desirable, so far as possible, to remove from the minds of the people the fear of prosecution under the present law for acts that had already been committed which had not yet been taken up and attacked.

Mr. EMERY. Then, so far as the first six sections of the Sherman Act were concerned, one year after the passage of this law, if it became a law, there would be a bar to any prosecution of any combination in restraint of trade, whether reasonable or unreasonable, by any combination or corporation presently in existence?

Mr. JENKS. I do not think that I see your distinction there. Will you repeat that?

Mr. EMERY. Under this provision, one year after the passage of this act, if it became a law, there could be no prosecution by the Government against any combination or any contract in either reasonable or unreasonable restraint of trade, entered into one year after the passage of this act, but the full force of the six sections would apply to any combination for restraint of trade excepted by the provisions of the registry provisions earlier in the act.

Mr. JENKS. Yes.

Mr. EMERY. Then, it would operate as a complete bar?

Mr. JENKS. That is, one year after it was passed.

Mr. DAVENPORT. Let us suppose that the American Federation of Labor exists, and we will suppose that it proposes to declare a boycott against a particular individual and bring to bear the force of its great organization against that individual. Is it your idea that that matter can be subjected and submitted to the Commissioner of Corporations?

Mr. JENKS. The American Federation of Labor, I believe, is not a corporation.

Mr. DAVENPORT. It can register under this bill.

Mr. JENKS. It can register, but it is not a corporation, and under this bill associations and organizations that are not incorporated are not required to register their contracts.

Mr. DAVENPORT. Section 10 reads as follows:

Sec. 10. That any corporation or association registered under this act, and any person, not a common carrier under the provisions of the said act approved February fourth, eighteen hundred and eighty-seven, or the acts amendatory thereof or supplemental thereto, being a party to a contract or combination hereafter made, other than a contract or combination with a common carrier filed under section eleven of this act, may file with the Commissioner of Corporations a copy thereof, if the same be in writing, or if not in writing, a statement setting forth the terms and conditions thereof, together with a notice that such filing is made for the purpose of obtaining the benefit of the provisions of this section.

Now, I want to know whether it is your purpose that the American Federation of Labor, before it brings to bear its million and a half of members against a single individual for the purpose of coercing him to do something, if they want to be protected, must submit the question of that boycott to the Commissioner of Corporations to see whether it is reasonable or not.

Mr. JENKS. I should say this, that it is not the intention of this bill to legislate for the Federation of Labor or any other particular individual corporation or association. The question ought not to be put in that way. But I will say this, that it is the intention of this bill not to compel those organizations to file their contracts, and, if you will notice, further than that it says this:

Nothing in this act shall require the filing of contracts or agreements of corporations or associations not for profit or without capital stock, and such corporations and associations while registered hereunder, and the members thereof, shall be entitled to all the benefits and immunities given by this act.

Mr. DAVENPORT. That is the condition as to registration.

Mr. JENKS. Pardon me. Let me answer your question. The intention of the bill is this, that they shall not be required to file their contracts in order to get the benefit of this act.

Mr. DAVENPORT. But in order to get the benefit of it they must file this and submit it to the Commissioner of Corporations, and he must pass on it?

Mr. JENKS. I do not think so.

Mr. DAVENPORT. Section 10 says: "That any corporation or association registered under this act, and any person," and so forth, "being a party to a contract or combination hereafter made, other than a contract or combination with a common carrier"——

Mr. JENKS. May file.

Mr. DAVENPORT. May file; that is, to get the benefit.

Mr. JENKS. May file.

Mr. DAVENPORT. Now, the question is whether these combinations of individuals to boycott—whether the American Federation of Labor——

Mr. LITTLEFIELD. Leave out the American Federation of Labor. Professor Jenks does not want that in it.

Mr. DAVENPORT. I stated that as an instance.

Mr. LITTLEFIELD. Say "labor organization." That is more agreeable.

Mr. DAVENPORT. Why is it more agreeable?

Mr. LITTLEFIELD. Professor Jenks wanted eliminated the specific name, so eliminate it. There is no trouble about that. You can do it.

Mr. DAVENPORT. In deference to the sentiment expressed by the chairman——

Mr. LITTLEFIELD. The chairman so rules.

Mr. DAVENPORT. I will say a labor organization.

Mr. JENKS. It seems to me perfectly clear that any labor organization or any association may, if it wishes to do so, file with the Commissioner of Corporations a contract, or a statement of the contract or combination, that it has made for the purpose of obtaining the benefit of this act. Now, I should say if any labor organization or any association that is not for profit, and without capital stock, wishes to file any contract it may do so. If it does not wish to do so, there is no compulsion on it to do so.

Mr. DAVENPORT. But do they get the benefit of the act if they do not?

Mr. JENKS. Moreover, under section 9 they need not file the contract in order to get the immunity.

Mr. LITTLEFIELD. I do not know that I get Mr. Davenport's notion, but perhaps it may be this. It strikes me he may have in his mind this proposition, whether it would be possible for a combination of employees—I will put it in the most inoffensive way—to advance and lay out what they propose to do in relation to compelling other people to accede to what might be their laudable demands, whether they could have that examination of their arrangements in advance, and have them authorized, or not. Is that your idea?

Mr. DAVENPORT. That is not it.

Mr. LITTLEFIELD. That is not it?

Mr. DAVENPORT. That is partially it.

Mr. LITTLEFIELD. If, when they filed it and the Commissioner held that it was not in restraint of trade, they would have a prima facie right to go ahead?

Mr. DAVENPORT. That is not the point. The question is whether or not they are obliged to file a statement of it and get his visé or his refusal before they can get the benefits of this act.

each would suggest a form. In the specific form here, I have not any idea who is responsible for it. But there is this thought from the first draft that was made along this line, and that was something that there was no change of opinion upon whatever, that pending suits must in no way be touched. There was absolute unanimity on that, from beginning to end.

Mr. LITTLEFIELD. You would concur in any amendment which eliminates that question?

Mr. JENKS. Absolutely.

Mr. MALBY. As to pending suits?

Mr. JENKS. Yes. If I may venture to be personal about this, inasmuch as the Commissioner of Corporations had his name mentioned here, and several other names have been mentioned, I remember speaking with some of the gentlemen, and they said, "I hope there will be nothing likely to be done that will affect pending suits," and I said, "So far as I am concerned and so far as I know, there is no thought of affecting pending suits." It has always been assumed.

Mr. LITTLEFIELD. I did not know but there was some purpose in it that I did not discover.

Mr. JENKS. Is there anything more in that section?

Mr. LITTLEFIELD. That could all be reduced to about one line, instead of ten lines, in the bill. On that point is it your judgment that the language of section 3 would, in fact, authorize a boycott under the Sherman antitrust law?

Mr. JENKS. I think not. It was not intended to legalize the boycott or the black list, and I do not think it would.

Mr. LITTLEFIELD. When you authorize a strike for any cause, does not that cover all causes? Suppose they undertake to injure the business of any person, if you authorize the strike for any cause, does not that do that?

Mr. JENKS. It does not seem to me it does, but I think the easiest way to dispose of that is this: If, in the judgment of the committee, that paragraph authorizes the boycott in the way we have been speaking of it, a malicious attack, I hope the committee will amend the section.

Mr. LITTLEFIELD. The better way would be to redraft the whole section, rather than leave it open to uncertainty.

Mr. JENKS. Yes. On the other hand, I think it should be made perfectly clear that a strike should be permitted. I may say that my own personal opinion is that, under the present law, a strike is admissible and is legal and that no employer is compelled to continue the employment, on the other hand, of any one of his employees. I think the right to strike and the right to discharge employees should be unimpaired. I think that is so under the present law, and if it is not it should be made clear in this bill.

Mr. LITTLEFIELD. At any rate, that is as far as you want to go?

Mr. JENKS. I know this is true, that the feeling on the part of laboring men is so apprehensive lest under the present law they are forbidden the right to strike that I think should be put in this bill to make it clear that they do have the right to strike.

Mr. EMERY. Do I understand you to hold that a strike for any cause that obstructed or impeded interstate commerce would be lawful?

Mr. JENKS. My intention was that in order to get those special immunities they should have to file the contract, if they are going to get the immunity under section 10. Of course not the other immunities that have to do with the latter part of the section. It is perfectly clear, I think, in the latter part of section 9, where it says nothing is necessary in the way of filing of contracts of associations and organizations without capital stock and not for profit, but they shall be entitled without that to all the immunities except such as are given by sections 10 and 11. But the special immunity, if you want to call it an immunity, that comes from the Commissioner of Corporations refusing to say anything and so throwing the burden of proof upon the Government, that of course would not be secured unless they filed the contract with the Commissioner of Corporations. Now, let me state further—

Mr. DAVENPORT. I am in search of information, and perhaps if I ask a question, your supplementary statement will be unnecessary.

Mr. JENKS. I should prefer to go on and finish my statement.

Mr. DAVENPORT. Oh, well, I suppose I shall have a chance to exploit these peculiar features of this bill later on.

Mr. JENKS. Let us suppose two labor organizations make a definite agreement with reference to a strike or anything else. That is then a regular contract. The probabilities, I should suppose, would be ten to one that they would not want to, and would not, file any such contract. If they do not file the contract, they do not get any of the benefits of section 10 or of section 11. If they choose to file that contract, they are situated the same as the others are. If the Commissioner of Corporations does not declare that the contract is unreasonable, the Government can not attack it without proving the unreasonableness. If he does declare it unreasonable, then they are under the present Sherman Act.

Mr. DAVENPORT. Then I understand that you do not intend to make a distinction in this act by which the gentlemen combining together to boycott a person, that being a voluntary association, are to be exempted from the provisions of the first six sections unless they file the thing and do not get the refusal of the Commissioner of Corporations to it?

Mr. JENKS. You need to make the distinction very clearly between the contracts of the organizations and the specific contracts they may make between themselves. So far as the contracts between the organizations themselves are concerned, they do not need to file any contracts. They can not get the special immunity of sections 10 and 11—that is, they can not get a ruling of the Commissioner of Corporations unless they file the contract.

Mr. DAVENPORT. Yes; but when they file these things, of course they come under the operation of the act, to a certain extent. On line 14, page 2, we find the language "association not for profit and without capital stock." In order to get under this act, as a preliminary they are simply required to file a written statement setting forth their charter or agreement of association and their by-laws, the place of their principal office, and the names of the directors or managing officers and standing committees, if any, with their residences. When they have done that they are entitled to be registered?

Mr. JENKS. Yes.

Mr. DAVENPORT. The question I put to you is whether or not it is the intention of the committee in drafting this bill to require them, in order to get immunity from the first six sections of the Sherman Act, to submit the matter of declaring a boycott, for instance, against a particular individual, and then have the action, one way or the other. Was that your intention?

Mr. LITTLEFIELD. I think the last three lines on page 8 come pretty near effectively taking care of your suggestion, because, after having provided that no suit or prosecution shall be begun unless the contract or combination is in unreasonable restraint of trade, it says that "no corporation or association authorized to register under section 8 of the said act approved July 2, 1890, as amended, shall be entitled to the benefit of this immunity if it shall have failed so to register." As I understand, this is general in its character and applies to both corporations and associations.

Mr. DAVENPORT. Then they must register?

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. Then when they register must they do as other people do and submit their contracts? Other people are required to submit them to the Commissioner of Corporations.

Mr. LITTLEFIELD. Your point is whether, in addition to registering, the condition as to determining whether it is unreasonable also applies?

Mr. DAVENPORT. Yes; but I want to know from him specifically whether it is the intent of the committee in framing the bill to do that.

Mr. JENKS. As I understand the matter, as I have said before, there is nothing requiring the filing of the contracts or agreements, and if they do not file them, they shall get all the benefits and immunities excepting this ruling of the Commissioner of Corporations as provided in section 10. They can not get the benefit of that ruling without filing their contracts.

Mr. DAVENPORT. And they can not get the benefit of the immunity, can they?

Mr. LITTLEFIELD. The ruling is the immunity, is it not?

Mr. DAVENPORT. No; the ruling brings the immunity in effect.

Mr. LITTLEFIELD. Yes; but the immunity and the effect are tied together in the operation of the bill?

Mr. JENKS. Yes.

Mr. ALEXANDER. It is not only your intention that they shall register, but they shall be entitled to immunity only in the event that their contracts are submitted to the Commissioner of Corporations and found to be reasonable; is not that it?

Mr. MARBURG. Perhaps I may be able to help you a little. It seems to be the purpose to differentiate between the registration of the corporation and this supplementary act of filing the specific contract which the corporation shall make thereafter in order to get immunity on those specific contracts.

Mr. LITTLEFIELD. That is the point.

Mr. MARBURG. If they register, the corporation for profit must give the contract, their corporate proceedings, and so forth. The labor organizations are not compelled to do that. Now we come to a supplementary thing, the making of a special contract, and when that is done they are both on the same footing.

Mr. DAVENPORT. Are you one of the committee?

Mr. JENKS. Yes.

Mr. DAVENPORT. Then the idea is that if a labor organization decides to boycott a particular individual, in order to be protected under this act from prosecution by the Government or from a proceeding in equity to restrain them from doing this thing, they must submit that boycott to the Commissioner of Corporations?

Mr. MARBURG. Yes. We object to that word because the Commissioner would never indorse a boycott.

Mr. ALEXANDER. But they have got to submit the contract?

Mr. MARBURG. Yes.

Mr. DAVENPORT. You do not mean a written contract, because it is specifically stated here that it is "a statement setting forth the terms and conditions thereof."

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. Now, I want to submit to the Professor, who seems to be very familiar with this bill, do you intend to make any change in section 8 of the existing Sherman antitrust act? In this bill you apparently ignore the fact that there are in the Sherman antitrust act eight sections. Now, you say you will add this. The question is whether you intend to make any change in section 8.

Mr. JENKS. There was no intention to do that.

Mr. DAVENPORT. In order to give point to my question let me give you the language. It reads as follows:

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

We understand thoroughly what that means, that anyone within that description is a person. Now, did you examine closely section 2 of this act, the act which Mr. Gompers referred to the other day? It reads as follows:

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The immunity section here only provides for combinations.

Mr. LITTLEFIELD. And contracts.

Mr. DAVENPORT. Is it your intention, or was it the intention of the committee, to leave under the operation of the Sherman antitrust act every person—that is unchanged under the law as it is now—who shall monopolize or intend to monopolize any portion of interstate trade?

Mr. JENKS. My impression in that matter is that if the word "person" is omitted here it was an oversight, and it was the intention to leave section 8 just as it stands.

Mr. DAVENPORT. You have answered that, but that is with regard to section 2.

Mr. JENKS. If I understand this matter, section 8, if it is included, wherever it is mentioned in this act would also cover section 2.

Mr. DAVENPORT. Yes. So that your correction of this act does not extend to a single person within the meaning of this law who monop-



lizes or attempts to monopolize? He must, in order to get exemption from this bill, combine or conspire with another person or persons to monopolize, because your act does not cover a monopolization, it simply covers contracts and combinations.

Now I want to put to you a specific case. I do not know whether it is so or not, but I have heard that the Standard Oil Company, or some other combination, does the same thing as was done by those gentlemen in the Mogul Steamship case; that is, in order to get the business for themselves they undersell, and by ruinous competition drive a competitor to the wall with the express purpose of getting the business for themselves, which I take it you will agree with me was held by the House of Lords in the Mogul Steamship case to be perfectly legitimate at common law. Was this omission advertent or inadvertent by which the—

Mr. PARKER. What difference does it make?

Mr. DAVENPORT. What difference does it make? It makes all the difference in the world.

Mr. PARKER. I do not see that it makes any difference whether it is advertent or inadvertent.

Mr. LITTLEFIELD. What was the question?

Mr. DAVENPORT. The question is as to the intent.

Mr. JENKS. I wish simply to say that it is not the intention of the committee, so far as I heard the question raised in any way, to make any specific exemption of anybody who was attempting to monopolize, any more than it was of anything else, providing he was doing acts unreasonably in restraint of trade.

Mr. DAVENPORT. It was not the intent?

Mr. JENKS. No, sir; if you put that word "monopoly" in.

Mr. DAVENPORT. The point is here whether or not the intent was to exempt from the amnesty or immunity portion of this bill the attempt on the part of anybody, being a person, to monopolize, provided they did not do it by combination with others.

Mr. JENKS. I myself would judge that that was covered by section 2 of the Sherman Act, is it not?

Mr. DAVENPORT. I judge not. From what one of the gentlemen said here, I judged that it was the intention not to have the bill apply to the monopoly features of the Sherman antitrust act.

Mr. JENKS. I think that was not the intention of the committee, and that the intention was to have section 2 apply. The intention was to have it apply to the monopoly features of the Sherman antitrust act; and furthermore, if it would be a matter of interest to you, I would say that had we not used so much time in the discussion of other things, I had intended to speak of the monopoly part as I have of some of the other parts in reference to the unreasonableness or reasonableness of the combination or of the monopoly. I think there was no intention to make such a distinction. Certainly it was not while I was there.

Mr. PARKER. That question as to whether a monopoly can be reasonable or not is an important question.

Mr. JENKS. I think it is under certain circumstances possible for a monopoly to be reasonable. Let me take a specific case. I should say that in any town, for example, or in adjoining towns, if we have a telephone system, it is desirable for that telephone system to be a monopoly. I am unfortunate enough to live in a town where the

telephone is not a monopoly, and there are two telephone systems there, and it is a decided nuisance. I think in many cases where we have a so-called monopoly, the monopoly is reasonable, but that monopoly ought to be under control of the Government. The attempt should not be made to abolish the monopoly. In that specific case it might be proper, if instead of a telephone company there was a man who owned the whole business, that he should have a monopoly, but under the same restrictions, if it can be so provided.

Mr. DAVENPORT. Under this bill is it not true that if there were two competing telegraph companies, like the Postal and the Western Union, and the Western Union went to work for the purpose of driving the Postal Telegraph Company out of business by cutting its rates with a view to getting them out of the business and getting a monopoly of the business, that they would not be under the immunity provisions of this bill?

Mr. JENKS. Certainly, it would be true that if it were decided to be reasonable and in the interests of the public for the two to combine, that they would be, and I should say that so far as the other point was concerned, if the courts were to decide that that was a reasonable act, they would come under the immunity; otherwise not.

There was one question asked a moment ago with reference to the trades unions that was answered by two or three people. Mr. Gompers suggested that he would answer that, and under the circumstances I think it is desirable that Mr. Gompers have his answer on that question recorded. Unless there are some questions, I have finished.

Mr. LITTLEFIELD. It is perfectly agreeable to the committee to hear Mr. Gompers now.

Mr. GOMPERS. I should like to ask the consideration of the committee for a few minutes.

Mr. LITTLEFIELD. That is agreeable, certainly.

#### FURTHER STATEMENT OF SETH LOW, ESQ., PRESIDENT OF THE NATIONAL CIVIC FEDERATION.

Mr. Low. Mr. Chairman, on Saturday you asked me who had been in consultation in connection with the preparation of this measure. I spoke at that time of those who had been more particularly concerned in drafting the bill, or some of them. But I should like to submit at this point a list of the men who have been in conference more or less on the subject. I have it here and should like very much to submit it.

The CHAIRMAN. Very well.

Mr. Low. Besides myself, there were Nicholas Murray Butler, Albert Shaw, Talcott Williams, J. W. Jenks, E. H. Gary, Samuel Mathers, Marks M. Marks, Henry L. Higginson, Robert Mather, Isaac N. Seligman, James Speyer, W. A. Clark, August Belmont, Francis Lynde Stetson, Victor Morawetz, J. H. Ralston, Samuel Gompers, John Mitchell, D. J. Keefe, James O'Connell, P. H. Morrissey, and D. L. Case.

I think I can say that all of these gentlemen are familiar with the details of the bill as it now stands; but it has been modified a great deal, and assumed its present shape only slowly. Professor Jenks

was the chairman of the subcommittee that drafted the bill, and I will shortly ask him to explain it to you.

I should also like to file the proceedings of the national conference, held at Chicago, which will give the list of delegates and the action taken there.

(The report of proceedings above mentioned was filed with the committee.)

Mr. Low. I observe that in the statement which I read to the committee on Saturday there was unintentionally one inaccuracy. I said that common carriers had to register with the Interstate Commerce Commission. Of course the only object of registration is to get publicity, upon which registration is based; and as they already got that through the Interstate Commerce Commission, they are not called upon to register in connection with this bill. They have the same privilege as others have who do register, because they give the publicity that is wanted.

I neglected also, upon the questions that were asked here and that I heard raised with other speakers, to say this, and I should like to submit this memorandum in connection with what I said the other day:

In reflecting upon the criticisms made upon the Hepburn bill, introduced at the request of the National Civic Federation, it seems to me that the scheme of the bill has not been perfectly appreciated. At the present time it is an executive duty, exercised by the Attorney-General, to determine whom to attack under the Sherman law. No one can find out whom the prosecuting department may choose to attack, nor when. Our bill does not change the legal status, under the Sherman law, of any combination or contract in restraint of trade, but it does provide a method by which business men can quickly find out, if they want to, from another Executive Department (that of Commerce and Labor) whether the executive is going to attack or not; and while the executive may change its mind, if time should show that a mistake had been made, it can then attack only by accepting the burden of proving that the thing complained of is in unreasonable restraint of trade.

Evidently this is not an extension of executive power, but a limitation upon it; and it involves no hardship upon anyone, for everyone is free to determine whether or not to apply for such a ruling. It is practically an offer, made in return for publicity, to define at once the attitude of the prosecuting department toward a particular combination or contract in restraint of trade. This is in the interest of uniformity in the policy of the Government under the Sherman law, and is distinctly unfriendly to a policy of selection and persecution, which is always possible under the law as it stands.

The point I wish to make is that so far from increasing the executive power, this bill tries to make harder the exercise of that power for those who want such a rule.

I should like now to present to the committee Professor Jenks, who was the chairman of the subcommittee by which this bill was prepared.

The CHAIRMAN. Just a word of inquiry before Professor Jenks begins his statement. You have given the list of the gentlemen who were associated in the preparation of the bill. As I understand it, the bill as it is presented to the committee is the result of twelve or thirteen redrafts?

Mr. Low. Yes, sir.

The CHAIRMAN. And by whom have those redrafts been made, by the attorneys who are members of the body that have collaborated together in producing the result? That is, have Brother Morawetz

and Brother Stetson (the only two I recognize as attorneys; there may be others there) been the men who have been formulating this bill and made these several redrafts for the purpose of reaching or embodying the views of the men who were desirous for legislation?

Mr. Low. Yes; they have been the drafters; and I should be very glad to submit to you, if you wish it, a brief from the legal point of view in regard to the bill.

The CHAIRMAN. We would a great deal rather have the attorneys right here. If Brother Morawetz and Brother Stetson wish to present a brief, we will accept it from them; but I will say now, that as far as I am concerned, there are a lot of things in this bill that I should like to get information on from Mr. Morawetz or Mr. Stetson, myself, from a legal point of view, and I would rather have them right here where I can talk with them than to take simply their brief. We will take their brief, too; but I should like to have them produced, if you can do it without inconvenience, so that I can make some inquiry of them in relation to the legal rationale of the whole proposition.

Mr. Low. I will make the statement to them, sir. They are not able to be here to-day.

The CHAIRMAN. No; we will fix the time so that they can be.

Mr. Low. I will ask Mr. Jenks, then, to address the committee.

The CHAIRMAN. We shall have a meeting a week from to-day, and they can be here without any trouble then. I suppose?

Mr. Low. I suppose the question of the time for adjournment will come up later?

The CHAIRMAN. Yes, sir.

Mr. Low. A week from to-day would be very inconvenient for me.

The CHAIRMAN. Then we will arrange that to suit your convenience. Nothing definite has been arranged about it. That is simply a tentative suggestion that was made Saturday.

Mr. Low. Yes, sir.

The CHAIRMAN. But whatever is done to-day will be done in accordance with what is agreeable to both of you.

Mr. Low. All right, sir.

The CHAIRMAN. I have a note from Professor Marburg—do I call him out of his name?

Mr. Low. I do not know that he is a professor.

The CHAIRMAN. He is an intelligent gentleman, anyway. I have a note from him this morning requesting me to have inserted in the record a table that he submits; and I take it that it is a table taken from some publication, submitted by him in some remarks. If there is no objection, that will go in as a part of the record. That is agreeable?

Mr. Low. Perfectly; yes, sir.

(The table referred to is as follows: the same being found on page 101 of the proceedings of the Trust Conference held in Chicago, Ill., October 22-25, 1907. Said table is taken from the address of Theodore Marburg, and relates to shares of stock of English railway companies.)

*Yearly dividends and prices February 1 of each year, 1898-1907.*

Name of road.	1898.		1899.		1900.		1901.		1902.	
	Dividend.	Price.	Dividend.	Price.	Dividend.	Price.	Dividend.	Price.	Dividend.	Price.
	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.
Caledonian .....	5	160	4½	156	4	141	4	130	4	126
Great Eastern .....	3½	120½	3½	122	3	123	3	107	3½	105
Great Northern .....	2½	58½	1½	63½	0	56½	0	45½	1	43
Great Western .....	3½	178	5½	167½	4½	167	4½	146½	5½	140
Lancashire and Yorkshire .....	5½	148½	5½	151½	4½	145	3½	131	4	113
London, Brighton and South Coast .....	6½	178½	6½	176½	4½	171	3½	133½	4½	126
London and Northwestern .....	7½	204½	7½	208½	6½	197	5½	179	6	170
London and Southwestern .....	6½	232	6½	222½	6½	208	5½	190	6	174
Midland .....	3½	93	3½	98½	2½	81	2½	75½	2½	75
North Eastern .....	6½	179	6½	181½	6½	175	5½	169½	5½	156½

Name of road.	1903.		1904.		1905.		1906.		1907.	
	Dividend.	Price.	Dividend.	Price.	Dividend.	Price.	Dividend.	Price.	Dividend.	Price.
	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.
Caledonian .....	3½	115	3½	104	4	112	3½	119	.....	102½
Great Eastern .....	3½	94½	3½	87½	3½	89	3½	87½	.....	79½
Great Northern .....	1	42½	1	39½	1½	39	1½	46	.....	44½
Great Western .....	5½	138	5½	137	5½	141	5½	142	.....	130½
Lancashire and Yorkshire .....	3½	108	3½	96	3½	104½	4½	109	.....	104½
London, Brighton and South Coast .....	4½	128	5½	105½	5½	128½	5	130	.....	116
London and Northwestern .....	5½	168	5½	152	6½	153½	6½	161	.....	153
London and Southwestern .....	6	174	6	165	6	160	5½	161	.....	153
Midland .....	2½	73	2½	68½	2½	68½	2½	69½	.....	66
North Eastern .....	5½	147	5½	139½	5½	139	6½	145½	.....	145½

**STATEMENT OF MR. HENRY B. TOWNE, REPRESENTING THE  
MERCHANTS' ASSOCIATION OF NEW YORK.**

Mr. TOWNE. I appear here as the representative of the Merchants' Association of New York, of which I have the honor to be president at the present time. My address is 66-72 Lafayette street, New York.

I may say briefly, Mr. Chairman, that the Merchants' Association of New York has a membership of some 1,200 corporations, firms, and individuals, representing almost every interest, manufacturing, mercantile, banking, law, and other professions.

Mr. LITTLEFIELD. That is, 1,200 different concerns?

Mr. TOWNE. Twelve hundred different concerns.

Mr. LITTLEFIELD. That would mean a great many more men than that.

Mr. TOWNE. A larger number of individuals.

Mr. LITTLEFIELD. Yes.

Mr. TOWNE. The work of the association is directed by an administration of twenty-four, and the details are distributed over a large number of standing committees. This particular question of which I am to speak was of such extreme and unusual importance and came up so suddenly as not to admit of delay, and therefore a special meeting of the board was called within three days after the introduction of the Hepburn amendment. The meeting was well attended, and

we had at that time the pleasure and advantage of listening to Mr. Low, who is of course better informed, perhaps, than anybody else concerning the intent of the bill, and we were in that way enabled more quickly than we might otherwise have been to gather its substance and purpose. After that meeting we attended your first and second days' hearings here, and finally, last week, we had a special meeting, for this special purpose, of our board of directors, at which out of twenty-three men seventeen were present, two being ill, and three out of the city. I mention this to show you that the matter has had most serious and earnest consideration and by a very representative body of business men.

Mr. LITTLEFIELD. Have you had the advantage of conferences with the counsel of your association in regard to the situation?

Mr. TOWNE. Our board includes several members of the bar, and they spoke freely, took an active part in the discussion, and one of them, my colleague, Mr. Bijur, will speak afterwards before the committee, although I understand he prefers to follow Mr. Davenport instead of preceding him.

I am therefore here, first, to express the very deliberate decision reached by the Merchants' Association of New York, and which I will state at the outset, namely, that we believe the proposed Hepburn amendment should not pass for the reasons which I will review briefly, and we believe that the wisest thing to be done at the present time would be to appoint a commission, of Congress or otherwise, to study this subject and get facts together in time for the next session as a basis for constructive legislation; and in saying that we wish to testify to our appreciation of what Mr. Low and his colleagues have done and are doing in their earnest efforts and desire to amend and improve the present law and to solve some of these perplexing problems. It seems to us, however, that nothing that anyone can do at this stage within the limited time available is likely to solve the questions and to make a permanent solution. My statement will be chiefly on the business and commercial side of the question. Others are dealing with the aspect that concerns labor. What I shall say will apply to industrial and mercantile organizations of all kinds. I am not a lawyer, and I recognize that this question involves technical matters which the representatives of the law must deal with. I am advised that it involves questions overlapping the State and the Federal jurisdictions, and there again I will find myself on technical ground; and therefore, Mr. Chairman, I will make no attempt to segregate what may pertain to Federal and what may pertain to State legislation, although of course I realize that that has got to be done in any Congressional action, but I will deal with the subject in the combined aspect, because I believe in that way I will most clearly get before the committee and into their minds certain facts which I believe are fundamental, and which I believe will be helpful at the present stage of the discussion.

We business men are profoundly concerned with this question. We object to our present position. Long before, and ever since, the passage of the Sherman Act in 1890, combinations—if you please to call them such—associations, agreements, have been the usage of the business community of this country; associations intended for many purposes, including, some of them, what is commonly now designated “restraint of trade or commerce.” Those arrangements have

been found expedient and useful, many of them beneficial to the public, as can be proven and as is probably known to everyone familiar with the subject. Others unquestionably have gone much too far and have been prejudicial to the public. But both at the present time are under the same ban and are forbidden, and yet the law of self-preservation is greater than even the Sherman Act, and business men in every line of business with which I am familiar, both of production and distribution, are engaged in agreements and associations of the kind that I refer to, to a greater or less extent. Far the greater part of the larger business of the country to-day is being done under agreements of one kind or another—trade agreements. What we business men want is something that will tell us what we may do and what we may not do. We are as law-abiding, we believe, as other classes of citizens, but in this present case we are confronted by two horns of a dilemma, and we are in trouble which ever one we choose. What we need and desire is a law which will define our rights and tell us what we may do, and indicate clearly what we may not do, and then we will know how to govern ourselves. Unlimited competition, which Mr. Carnegie speaks of in the letter which Mr. Low has just read, is an undoubted benefit in nearly every way. It has its evils, however, like other good things, and has proven again and again to spell ruin if carried to an extreme. It would tend in many directions to stop the growth of our industries and our business by making them so unprofitable that capital would find no temptation to engage. Capital must be enabled to live; there must be a living wage for capital as well as for labor; and where competition becomes so rampant and riotous as to prevent that, some method has been found absolutely necessary for the preservation of industrial life. The law should recognize that and define those that are reasonable and separate them from those that are unreasonable. Nearly all business is being done under restraint of some kind by State or Federal authority. If we think for a moment, how many industries can we think of in which something of that kind is not being done more or less openly? The railroad business is notoriously conducted under restraints of all kinds, uniform tariffs for passenger and freight service, mileage rates, and so on. City service is conducted by agreements or usage. The 5-cent rate prevails almost uniformly. And so it is as to telephone companies and telegraph companies; and even hotels have an agreement as to rates of charges for like service; and even professional men, such as doctors or lawyers, have agreements among themselves for the maintenance of reasonable rates as to what men ought to charge for certain services.

Mr. LITTLEFIELD. I think as a rule the lawyers provide that there shall be a minimum charge, leaving it to every fellow to charge all that his nerve will give him.

Mr. TOWNE. That is what we business men are doing. We agree on a minimum rate, but we do not object to our competitors charging as much as they please and as much as the traffic will bear. But as a rule that is true.

This is also true as to labor. If labor is at liberty to combine and fix a minimum rate, why should not the products of labor do the same thing, especially where the product involves not only labor, but capital, and also brains. Should not the intellectual product of the human being be entitled to benefits of this kind as well as the

physical and manual product? In most countries the laws conform to the usages of the people. The usages of all people in these commercial matters have changed greatly in the last generation by reason of the vast change that has taken place in our commercial and industrial conditions. You are all familiar with this. Now, what we need is a definition of what the law will permit and what the law forbids in these matters. In other words, we want a standard, and that word "standard," it seems to me, Mr. Chairman, is the keynote of what can be done to solve this problem. I will come back to that in a few minutes. The courts have told us, as I understand it, that without a standard they are incapable of interpreting the law concerning which there is no satisfactory provision or definition. I am told by my legal friends that in the *Trans-Missouri* case the court held that any contract made between two parties was reasonable between them, but whether that contract as reasonable as to the public was a question that the court was unable to decide, because the court had no standard to measure by. If that is a correct reference to the decision in that case, it emphasizes what I wish to dwell upon here, that what we wish is a standard. The law should be known and fixed in advance for business as for everything else, so that business men may make their plans on a solid foundation, guided by their legal advisers as to what the consequence and the intent of the law is, and proceeding then with the assurance that if they have had good advice they are keeping within the law and doing what it permits. My position, Mr. Chairman, would be entirely changed if instead of a body of fixed law we had to depend on rulings made by an executive officer of the Government and subject to change from time to time and applied in each specific case not in advance of the acts, but after they had been committed or after the parties concerned had practically committed themselves to the carrying out of a plan which they pertained to.

It seems to us business men, further, that the aim of the law in these matters should be to make commerce free, not to put restraints on it; to remove them rather than to impose them. Restraints are only needed to prevent abuses. Now, what are the abuses? If they exist they can be defined. It is inconceivable that an abuse exists, and it is indefinable and is impossible of definition. Has any attempt been made to define abuses? Not that I know of. The Sherman Act forbids all restraints, in terms so sweeping as to include those that may be beneficial, without even seeking those that may be beneficial, or what are of the contrary nature. The purposes of these trade agreements and combinations I have referred to may be classified, for purposes of this discussion, into three heads. Under the first head are things clearly that are not abuses or restraints of trade: such, for example, as to maintain the quality of a product, which is a public benefit and not an injury; to exchange information among the members of the trade; to determine credit ratings of customers; to correct freight classifications; that is, where a product has been classified so as to subject it to a higher tax or freight than it should carry. These are all matters which even the Sherman Act would not forbid, and which are distinctly beneficial, not only to the individuals, but, in the long run, to the community.

Mr. LITTLEFIELD. That is, those are allowable now?



Mr. TOWNE. Those are allowable now. Next I come to the classification that I put down as doubtful; I do not know to-day whether the Sherman law forbids or permits them. For instance, to fix uniform terms of sale, you group the manufactures making textile products and you will find some of them are allowing thirty days, some sixty days, some ninety days, and some four months for payment.

Mr. LITTLEFIELD. Terms of credit, you mean?

Mr. TOWNE. Terms of payment, which are terms of credit. They get together and make the time thirty days or sixty days. We all adopt the same rule. Again, they take up the question of cash discounts. It is the custom to allow 1 or 2, or sometimes only one-half of 1 per cent, to customers who pay spot cash instead of buying on time. The period allowed for that cash discount is very material. The members of a group will get together and say, "We will agree on a fixed limit for that, twenty days or ten days." Again there is the matter of a uniform freight allowance for customers. In most industries the manufacturer makes some allowance for the delivery of the product; it may be limited to radius, to a 25 or 50 cent rate per hundred pounds. They get together and agree upon that. At other times the question of samples becomes an important element of cost. The textile manufacturers again will get together and agree upon what shall be the sample allowance to customers. Any one of those things would be considered—

Mr. LITTLEFIELD. What is the relation of the allowance of samples to the trade?

Mr. TOWNE. That is because the cost of samples in some lines of trade is so great as to constitute a distinct allowance to the customer if you give them to him without cost. So we will agree to charge him for them or allow him so much on the sample account. Collectively those four items, no one of which alone is important enough to be construed as being forbidden under the Sherman Act, would amount to enough to give one manufacturer out of a group a position of extreme preference among his customers if all the other members of that group enforced this agreement rigidly. So I say here is a group of doubtful conditions which, taken collectively, do constitute a certain measure of restraint of commerce. Now, are we at liberty to do these things or are we forbidden? To-day we are in the dark, and we would like a definition.

Mr. ALEXANDER. But you are doing them.

Mr. TOWNE. But we are doing them; nearly all of us are doing them, or to some degree. But these are matters of usage and have been so for a hundred years.

Mr. LITTLEFIELD. Are they matters of usage or of arbitrary agreement between the men engaged in business in the particular lines of trade?

Mr. TOWNE. They are both; but as the business has become more diversified and distributed, the parties overlapping in their territories, they have more and more become matters of agreement. The parties get together and discuss what is reasonable and then agree to adhere, all of them, to the rules established.

I come next to certain things that are clearly forbidden under the Sherman Act as it has been interpreted, namely, first, an agreement for the uniform classification of products. There are two manufac-

turers of chairs, if you please, one making this chair and another making that chair, of different patterns and yet so nearly identical as to make them competitors. They get together and say that these two shall be classed together, and they agree upon a minimum price for that grade of chair. That is a practice that is prevalent in production and distribution all over the country. That is forbidden. If it is to be permitted, we would like to know it. If it is to be absolutely forbidden, we would like to know that, and adjust ourselves accordingly, either within the law or to have the law so changed as to permit these things which now are either forbidden or left so nebulous that we do not know what we may do and what we may not.

Mr. ALEXANDER. You say "forbidden." On what do you predicate that word, if they are going right along and doing it all the time?

Mr. TOWNE. It is forbidden by decisions of the courts, not only in specific cases, but on similar cases which have been adjudicated, and from which deductions can be drawn.

Mr. LITTLEFIELD. As a matter of fact, very few cases have been judicially passed upon?

Mr. TOWNE. Very few.

Mr. ALEXANDER. Has anything like that been passed upon, like the illustration you gave?

Mr. TOWNE. Yes; an illustration was given at these hearings by Mr. Schieffelin of what most persons, I think, would regard as an unwise if not vicious application of the system in some of its ramifications.

Mr. LITTLEFIELD. You mean an unwise application of the law or an absence of the power to agree and combine?

Mr. TOWNE. An abuse of the practice.

Mr. LITTLEFIELD. Of agreeing and combining?

Mr. TOWNE. Yes.

Mr. LITTLEFIELD. That is, your idea is that the particular practice might well be forbidden?

Mr. TOWNE. As he stated those things at the hearing.

Mr. LITTLEFIELD. Yes.

Mr. TOWNE. It seems to me they have gone in some directions farther than public policy would indicate to be expedient.

Mr. ALEXANDER. May I interrupt you just a moment?

Mr. TOWNE. Certainly.

Mr. ALEXANDER. I am a little anxious to get that down more specifically, if possible. Take your illustration of the two chairs. Has anything been judicially decided that would be analogous to that illustration in any way, shape, or manner?

Mr. TOWNE. I regret that I am not a lawyer and am not conversant enough with the decisions to answer that confidently. I have no doubt that Mr. Bijur, who follows me, will be able to answer it. I suggest that that may be passed until he comes before you.

Mr. ALEXANDER. Very well.

Mr. TOWNE. I can say this, however, and say it with confidence, that we business men have the conviction that it has been the trend and purpose of the decisions in the cases that we shall not do what your question implies.

Mr. LITTLEFIELD. Would you think it would be prudent to allow business men to enter into combinations and agreements that would enable them to arbitrarily increase the price to the customer?

Mr. TOWNE. Under proper qualifications and restrictions, I would.

Mr. LITTLEFIELD. That may be the crux of the whole proposition.

Mr. TOWNE. It is the crux of the whole situation, and that is just what I am coming to.

Mr. LITTLEFIELD. I was going to say that I supposed the whole object of the Sherman antitrust law was to prevent the charging to the consumer of an exorbitant price, whether it is transportation or merchandise that is sold.

Mr. TOWNE. Yes.

Mr. MALBY. I presume what you contend for is that you may have such a combination that will permit manufacturers or salesmen to obtain a reasonable price?

Mr. TOWNE. Precisely, sir; and yet as the courts according to my understanding have said, the terms "reasonable" and "unreasonable" are so indefinite as to afford no rule for the guidance of the court. I say if that is a fact, the question before us is to make a rule to furnish a standard. And referring back for a moment to these three groups that I have indicated, of things that clearly are permissible now or others that are clearly forbidden now, and should be forbidden, and another group that are doubtful; I say why can not these be embodied into a law or a standard? I believe that it is feasible for the business men of the country to indicate what they think they would like to be allowed to do, and what is reasonable, and then you lawmakers having that information to guide you could formulate that into a law which would become a rule for the guidance of the courts. Then the courts could pass readily on the facts submitted and apply the law. If that should be the outcome, I do not see just where the need is then for any commission or any administrative body to interpret the law. The courts are a pretty good institution for that purpose.

I would like to ask, in concluding this part of the argument, as to all business which is not based on a monopoly granted by the State—I am not referring now to patents, but to transportation and telephones and public-service corporations—why should not every citizen be free, alone or in combination, to do as he sees fit so long as others have the liberty to do likewise and so long as there is not a conspiracy to their injury? It has been argued—and I think soundly—that the boycott should be forbidden, because it is a combination of two or more persons to injure a third person. I will admit the same ruling as to business, that a combination of two or more persons to injure a third, or to injure the public, should be forbidden; but we should have some standard by which to determine whether any given act is capable of producing that effect and with such intent. There, again, we see the need of a standard. If we can establish that standard, we will have something to go by, and I think these difficulties will very largely clear themselves. The absence or the disallowance of this right of two or more to combine for reasonable things would imply that the State has the power to say to a man, or a group of men, in business, "You must do business under such-and-such conditions, even if it ruins you; and if you do not like it, you must give up your business." That is not public policy. To carry it out to its logical end, it would be disastrous to the country, to the interests of all.

What we need, Mr. Chairman, it seems to me, is a law based on present conditions, not on past or future business conditions, but on

present conditions of commerce. It should be based on facts, on the usages of our people, which will enable a definition or standard to be made which will broadly define the things which are to be permitted, which are tolerable or reasonable or laudable, and which will put in another group the things which are unreasonable and intolerable and which should be forbidden. Give us a standard, and we will know how to conduct our business accordingly; and with the courts to interpret that standard, I do not think we would find much for the proposed commission to do.

Mr. LITTLEFIELD. What are the changes, the fundamental changes you speak of, which prevail in doing business?

Mr. TOWNE. Let me take one little illustration. Take the shoe trade; we need hardly go back beyond my childhood to reach the time when the shoes were all made by the little local shoemakers, the cobblers, and were sold by them to their customers. To-day the shoes for the masses are made in great factories employing thousands of operatives, employing machinery costing millions of dollars, machinery largely automatic, whereby the labor of one man is productive ten or twenty fold to what it was years ago, and the cost of the product is correspondingly improved; and the product made in these great hives of industry is sold not in the old channels, through the little cobbler, but through a large distributing agency, wholesale and retail. Those agencies are scattered through the communities of the land, far and wide. Here we have, between these two conditions, such radical and fundamental changes and differences as to justify, I think, the statement that I have made that within the last fifty years industry and commerce in our country have been revolutionized.

Mr. LITTLEFIELD. What legal changes does that change in business involve?

Mr. TOWNE. It has brought about new conditions in the conduct of business. That, in turn, has led to new usages of business men, manufacturers, distributors, and carriers, and those usages are now, some of them, held to be contrary to a statute of the United States. That statute is so indefinite and broad as to give no standard of measurement which enables us in any line to guide ourselves, and we ask you to take it up and reconstruct it on lines which we can understand and follow and respect.

Mr. LITTLEFIELD. Did not the same legal condition obtain fifty years ago in relation to business that had developed to that extent?

Mr. TOWNE. Yes; with the conditions of business they had, the laws were doubtless in harmony and adjustment.

Mr. LITTLEFIELD. Did not the legal differences exist?

Mr. TOWNE. The business differences are such that the law, it seems to me, has not changed to conform itself to those great changes in business.

I would like to make one illustration in connection with the shoe trade. Suppose a village in which the cobbler is still existing, or rather, where shoemaking by hand still exists, and suppose there are in that village two little shoe shops, each of them employing one or two shoemakers—cobblers. And then suppose those working shoemakers get together and say, "Here, we will not work for you employers for \$2.50 a day, which we have been getting, but you must pay us \$3 a day," and there is a strike, and they win their point;

and the two shoe dealers pay them \$3 a day. Thereupon they say "We can not live upon this basis. You and I have been selling shoes for \$3; let us make it \$3.50 a pair," and they agree on that. Now, the first of those acts, namely, the agreement among the employees to withhold their labor except upon a certain advance in price, as I understand, is sanctioned to-day—unless it were interstate commerce, and of course I appreciate the distinction there—whereas the corresponding act of the employers of labor as to the products of that labor is not sanctioned. That is an incongruity which, I submit, needs abbreviation.

Mr. Chairman, I have practically said all I want to on this subject from the view point of the business man, and I will ask for about five minutes more to read rapidly the argument on which the conclusions of the merchants' association were based which led up to the resolutions which they adopted.

Before the Sherman Act of 1890 there was no statutory restriction on combinations affecting interstate commerce. Those entering into such combinations were amenable to the common law of the several States, and, by taking legal counsel, could inform themselves in advance with some certainty as to the legality of their proposed action.

The Sherman antitrust act of July 2, 1890, prohibited all combinations and agreements in restraint of interstate commerce.

The provisions of the Sherman Act, under the decisions of the courts, especially the recent decisions of the Supreme Court, have been held to apply to combinations by labor as well as to combinations by employers and producers.

The Hepburn amendment now proposes to modify the Sherman Act by enacting that, upon compliance with certain conditions, combinations, whether of employers or employees, which are not held to be in "unreasonable restraint of trade or commerce among the several States or with foreign nations," will be permitted. This proposal thus recognizes the existence of such combinations and seeks to legalize such of them as conform to some standard hereafter to be defined.

There is the point which I have been dwelling upon—the need of a standard. We want things to be defined in advance, and not after the act.

The proposed line of demarcation between what is permitted and what is forbidden is the reasonableness or unreasonableness of each combination or agreement in restraint of interstate commerce. Lawyers assert that legislation on this basis is unknown and impossible, and quote a recent decision in which the court held that any agreement voluntarily entered into between two parties is "reasonable" *inter se*, but whether reasonable or unreasonable as to the public the court could not say, having no basis of law as a guide. In other words, the law must either define accurately what is forbidden, or, if this is left wholly or partly to the discretion of the courts, must set up some rule for the guidance of the latter in determining whether or not the law has been violated. No such rule has yet been laid down as to what constitutes reasonable or unreasonable restraint of interstate commerce.

That is what is needed, it seems to us, at this stage; and again I emphasize that it is a standard—a standard for the courts in their

decisions, a standard for business men in the establishing of their affairs and in the conduct of their business.

It would appear, therefore, that those who desire to have the Sherman law amended should now address themselves to an effort to formulate some definition, which can be embodied in a statute law, of the line which, in a broad sense, marks the division between combinations, whether of employers or employees, which are reasonable and those which are unreasonable. It seems probable that some clearness and convenience may result if, in this attempt, combinations of employers are dealt with separately from combinations of employees—not because of any inequality of rights, but because of the difficulty of covering in one statement of law conditions which, while identical or similar in kind, differ widely in degree and application. Another distinction may properly be made between public corporations—that is, those holding grants from the State, which to a greater or less degree are monopolistic, such as common carriers and all other public-service corporations—and private corporations and individuals whose business is not based on such grants or franchises from the State.

As to private corporations and persons, it would seem that the fundamental fact at issue is the right of two or more to combine to control the prices at which they sell their product or their merchandise.

I stated that plainly, Mr. Chairman, because it seems to me it is the crux of the whole situation. Is it permissible in this land of ours under any conditions whatever for two or more persons to combine and determine upon a minimum price at which they will sell something which belongs to them, which they are under no obligation to offer for sale or to sell, which every other citizen in the land is at liberty to engage in the production or sale of? In other words, when any natural or corporate monopoly exists, is it not to be permitted for two or more persons to make an agreement of that kind? We think it should be permitted. It is being done far and wide, from one end of this land to the other. We think it should be sanctioned by the law and that the law should define how far it may go and where it should stop. We think that the law should create a standard.

Mr. ALEXANDER. You have not ventured to define a standard yet.

Mr. TOWNE. I am coming to that in one moment.

Mr. ALEXANDER. Very well.

Mr. TOWNE. Under early English law even a partnership of two persons was prohibited, whereas to-day all persons are free to unite under partnerships or under corporations for the prosecution of lawful undertakings. Long before the passage of the Sherman Act in 1890, as well as ever since, individuals, firms, and corporations have entered into agreements for the regulation of prices. The Sherman Act makes these illegal in interstate commerce. What is sought now is to legalize such acts where found not to be "unreasonable," and thus to bring the law into conformity with the usages of the people. The difficulty to be overcome appears to be the formulating in clear and unequivocal language of a definition as to what is "reasonable or unreasonable," or what is good and what is bad in the matter of trade agreements.

Before the passage of the Sherman Act this question rested with the courts as to each litigated case, and the parties concerned, or their

counsel, had as a guide the body of the law and previous decisions relating to adjudicated cases of this kind. Under the Sherman Act all combinations affecting interstate commerce are forbidden. The proposed Hepburn amendment is in effect an invitation to corporations and others to submit to the Commissioner of Corporations (the head of a Bureau of the Department of Commerce and Labor) such information concerning its financial conditions, its contracts, and its corporate proceedings as may be called for under rules hereafter to be prescribed by the President, and in return, at the discretion of the Commissioner, to receive a certificate of registry entitling the parties concerned to the benefits and immunities of the Hepburn Act.

This plan, therefore, proposes to substitute for the courts, the tribunal heretofore having jurisdiction of these matters, an officer of one of the administrative Departments of the Government. In this respect it would seem to be revolutionary and contrary to the fundamental principles on which our Government heretofore has been based.

The Hepburn bill provides that these decisions shall be made by the Commissioner of Corporations "with the concurrence of the Secretary of Commerce and Labor," but it is obvious in advance that the vast volume of documents to be reviewed and the infinite number of questions which would arise under this plan, would be beyond the power of any one person to deal with, and that, therefore, in practice the work would of necessity be distributed among a number, probably a vast number; of clerks and other subordinates of the Commissioner. If so, it would follow that each of the latter would in effect have the power of deciding, as to each case referred to him, whether the business operations of the parties concerned were reasonable or unreasonable, and whether they should be sanctioned or forbidden.

The plan thus indicated is suggestive of a national "bargain counter," where those desiring to conduct their business on certain lines must apply and negotiate for permission, where the decision would be vested in a minor governmental employee, and where opportunities and inducements for corrupt practices would be rampant. The change would imply the substitution of a bureaucracy for the judiciary as the source of authority and control and decision in regard to all of the vast interests at stake.

In effect the Hepburn bill divides those whom it would affect into three classes, viz:

- (1) Those who register and whose methods are approved.
- (2) Those who decline to register and who, therefore, would not come under the provisions of the act.
- (3) Those who apply for registry by filing the required information concerning their affairs, but to whom registry is refused.

It seems to me the latter group would be placing themselves in the most precarious and unfortunate position. In certain initial utterances and in certain discussions of these matters the first two divisions have been likened to the sheep and the goats. We are to separate the sheep from the goats; and I will venture a simile of a third animal, and will call him the fox, who would be typical of the third group.

The sheep, being within the fold, are exactly where they stand to-day, and liable to the same penalties, neither more nor less. The foxes, however, having filed with the Department of the Government

detailed information available to another Department of the Government (the Department of Justice) on which they are liable to prosecution, are fair game for the guardians of the law, and could not complain when the latter engaged in the chase which the law makes it their duty to pursue.

Clearly, the starting point for any new constructive legislation must be the definition of a standard or rule for the guidance of the courts in the interpretation of the law, whereby they may be enabled to determine whether a specified contract or agreement in restraint of trade, as shown by the evidence submitted, is lawful or unlawful. The Hepburn bill does not define or create any such standard. It merely transfers the adjudication of these questions from the courts to a Department bureau, and then lays down no rule for the guidance of that bureau in making its decisions on the vast number of questions which would come before it and which would affect vitally every great business interest of the country. The bill shirks this point and shifts upon the President the lawmaking function which the Constitution vests in the Congress.

Instead of fixed and definite laws we would have a set of rules made by an individual, to wit, the President, subject to change without notice by him or by his successors, at pleasure and because of any passing sentiment or whim. In brief, we would have personal government and instability in place of law and order.

As an indication of what appears to be called for in the way of a definition in relation to combinations to control prices the following, without pretending to be practicable or adequate, is offered as an example:

That it shall be lawful for two or more persons or corporations to agree upon the minimum price at which either shall sell a specified article within a specified territory, provided that within the territory to which such agreement applies the article so specified is procurable from not less than an equal number of other persons or corporations not parties to such agreement.

I do not say that that is practical, but it is typical of what I have in mind.

Mr. LITTLEFIELD. That comes pretty near Mr. Bryan's 51 per cent.

Mr. TOWNE. I do not say that that is practical, but it indicates the type of thing that is wanted, because such a law would establish a standard. If a law like that were upon the statute books it would then become a question of fact for the court in each case to determine whether there was a greater number.

Mr. LITTLEFIELD. Do you mean the greater number of men, or the greater amount of the product?

Mr. TOWNE. I am not discussing it practically.

Mr. LITTLEFIELD. Merely as an illustration?

Mr. TOWNE. I have offered that as an illustration, crude but typical, of what I am talking of.

Mr. ALEXANDER. Will you not read that again?

Mr. TOWNE. It reads:

That it shall be lawful for two or more persons or corporations to agree upon the minimum price at which either shall sell a specified article within a specified territory, provided that within the territory to which such agreement applies the article so specified is procurable from not less than an equal number of other persons or corporations not parties to such agreement.

Now, what I seek to illustrate there is that here is a law which the court can understand and which the parties interested can under-



stand in advance, and that, if a case is brought into court, the question before the court would be on the facts as to whether the facts came within or without this definition. In other words, it would be a standard applying to one particular kind of action in restraint of interstate commerce. If we could have a series of such definitions—two, three, ten, or whatever number might be needed to cover the broad principles which in the opinion of the business men of this country represent things which they should be permitted to do, which on the whole are not prejudicial to public policy but on the contrary are beneficial—then I say that having such standards the business of the country would adjust itself thereto and disputed cases would be readily adjudicated by the courts.

Mr. LITTLEFIELD. Do you think that they ought to be allowed to enter into that kind of an agreement entirely, irrespective of the question as to whether the minimum price did or did not furnish a fair return on the capital invested in the business?

Mr. TOWNE. Mr. Chairman, I have opinions, of course, on so leading a question as that, and I submit that it is precisely questions of that kind which should be studied and facts concerning them gathered as the basis for constructive legislation here.

Mr. LITTLEFIELD. In other words, they suggest the difficulties involved in the situation?

Mr. TOWNE. Yes, sir. The opinion of the merchants' association, which I represent, is that the pending bill should not be passed, but that a bill is most desirable creating a commission, of Congress or otherwise, which shall take up these matters and invite the business men of the country to come here and meet you here or elsewhere and put into words the standards on which they can rely to conduct their business.

I will take only one minute longer, Mr. Chairman, to have embodied in your record these resolutions of the Merchants' Association of New York. The preambles I will not read, because they practically consist of what I have stated, and I will, therefore, read only the resolution itself, which is as follows:

*Resolved*, That, in the opinion of the board of directors of the Merchants' Association of New York, after careful consideration of the proposed amendments and the issues to which they relate, it is expedient—

1. That the said Hepburn-Warner amendment should not be enacted into law.

2. That Congress, at this session, should create a commission, authorized and instructed to investigate the matter at issue, to collect evidence thereon from recognized representatives of labor, industry, commerce, and transportation, at home and abroad, and to embody their conclusions in a report, which shall include specific recommendations concerning further legislation, at as early a date as may be feasible.

I thank you for the opportunity of being heard.

Mr. JENKS. May I state that that interpretation of the bill is not a fair interpretation, and later on we will attempt to show wherein it is not. We thought we had better simply make a statement now that the interpretation of the bill by the Merchants' Association of New York is not a fair interpretation.

Mr. LITTLEFIELD. You do not think that is an adequate construction of the bill have you submitted?

Mr. JENKS. No, sir.

Mr. TOWNE. May I say that the Merchants' Association of New York appreciate most highly the work of the Civic Federation, and are convinced of their sincerity.

Mr. LITTLEFIELD. I might say with regard to the collection of evidence that there is a large volume of evidence in the reports of the Industrial Commission which sat for some three years looking into these special matters, and perhaps accomplished as much as could be accomplished by a new commission in three or four months. I believe that the Industrial Commission made some specific recommendations, did it not?

Mr. JENKS. Yes, sir.

Mr. LITTLEFIELD. If you have any occasion to do so you can put those into the record later on. You are quite familiar with those, are you not?

Mr. JENKS. Quite so.

#### STATEMENT OF MR. DANIEL DAVENPORT, OF BRIDGEPORT, CONN.

Mr. LITTLEFIELD. There are some members here of a Chicago Business Association who wanted to be heard some time to-day, and I told them if they got around in a couple of hours they would be in time. You and Mr. Emery are here and can be heard at almost any time, and I suppose you would be willing to give way to these gentlemen?

Mr. DAVENPORT. Mr. Cowan is here representing the National Cattle Raisers' Association and the farming interests of the West in opposition to the bill. He has been here, he says, for ten days awaiting an opportunity to be heard, but he prefers that I go on and state some of the law bearing on this subject, and then I would request that he may follow me. I would be willing to break into my argument and give him an opportunity whenever he desires.

Mr. LITTLEFIELD. That is, you are willing to go on for a time and then suspend to give him an opportunity to make his statement?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. That is perfectly agreeable to the committee.

Mr. DAVENPORT. Mr. Chairman and gentlemen, the Sherman anti-trust act was enacted in 1890, and inasmuch as its provisions are to be affected by this proposed legislation, and inasmuch as that act is very short, I would like to read it and have it inserted in the record at this point. It is to be found in 26 Statutes at Large, page 209, chapter 647. It reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall

be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties shall be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States; and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold, by damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Public No. 190, approved July 2, 1890, first session Fifty-first Congress.

That is the Sherman antitrust act, to which various amendments have been proposed, several of which, as I understand it, in addition to the so-called Hepburn bill, are before this subcommittee.

MR. LITTLEFIELD. That is, there are other bills in addition to the Hepburn bill relating to the Sherman antitrust act.

MR. DAVENPORT. Yes; there are several ways in which the Sherman antitrust act, which I have just read, could be absolutely destroyed as a legislative enactment. Of course the first one would be by its express repeal.

The second way would be by writing into the first section the word "unreasonable," so that it would read, "Every contract, combination in the form of trust or otherwise, or conspiracy, in unreasonable restraint of trade or commerce among the several States or with for-

sign nations, is hereby declared to be illegal." Or the same result would be effected by doing as is suggested in the Foraker bill, saying that hereafter the courts in construing that section and the corresponding section in the Dingley tariff bill, to which no reference whatever is made in this Hepburn bill, shall construe it so as to forbid contracts, etc., in unreasonable restraint of trade; that the provisions of the Sherman Act shall not be construed to apply to any contract or combination other than those in unreasonable restraint of trade.

A third means of destroying the act would be the method proposed in the Hepburn bill.

A fourth way to destroy the act would be to so broaden its provisions as to make it cover matters not within the scope of the power of Congress in regard to interstate trade, this, under principles that are entirely familiar to the committee and to everyone else now, having been illustrated in the recent decision under the employers liability act, would be fatal to it.

And still another way would be to exclude from the operations of the Sherman antitrust act certain associations and organizations which would then be permitted to do the things which are forbidden by the act as to everyone else.

Mr. LITTLEFIELD. On what ground does that last proposition destroy the effect of the Sherman antitrust act?

Mr. DAVENPORT. I was going to present some authorities. That, of course, is manifest because it violates the fifth amendment to the Constitution.

Let me repeat what I have said, so that we may understand these methods. The several ways by which the Sherman antitrust act could be destroyed as a legislative enactment are, first, by its repeal; second, by writing into the first section the word "unreasonable," before the words "in restraint of trade;" third, by the changes in it which are proposed in the Hepburn bill, so called; fourth, by expanding its provisions so as to cover matters not within the scope of the legislative power of Congress, many of the matters mentioned by Mr. Towne being of that character; and, fifth, by specifically excluding from the operation of the act certain combinations and certain associations.

Mr. Low. Does not Mr. Davenport intend also to include the Foraker bill?

Mr. DAVENPORT. The Foraker bill is covered under the second head. Now, Mr. Towne has struck the keynote, has laid his finger on the fatal principle, you might say, or on one of the principal and fatal defects in the proposed Hepburn bill and in the Foraker bill, so called, which is the attempt to separate combinations into those which are in reasonable restraint of trade, and those which are in unreasonable restraint of trade, and make the Sherman Act forbid only the latter.

The first thing which strikes anyone on examining the Sherman antitrust act is that it is a penal statute. and a highly penal statute. It makes the act done a crime.

Mr. LITTLEFIELD. It makes the prohibited acts crimes.

Mr. DAVENPORT. Yes; and it subjects the party under the statute to treble damages in the event of the party being injured in his business or property by anything forbidden in the act. It also confiscates

trust-made goods in transit. I say that the insertion of the word "unreasonable" there would totally, effectually, and forever destroy this act; and fortunately that assertion, which I believe would be acquiesced in by every lawyer in the country upon reflection, is thoroughly sustained by the decisions of the courts, especially the courts of the United States, both the subordinate courts and the Supreme Court. Of course every lawyer, and for that matter every intelligent layman, will recognize the fact, and Mr. Towne has very clearly brought it out in his statement, that before you can make an act either criminal or penal, under the glorious Constitution under which we live, you must define the law so that a man may know when he is guilty, so that the law may be laid down to the jury, so that the finding of the jury may be upon the facts under the law as thus laid down, and so that the judgment may be pleaded in bar to any further prosecution or proceeding.

Mr. LITTLEFIELD. That is, you think that the provisions cited should be defined and specific instead of indefinite and uncertain.

Mr. DAVENPORT. It is an absolute prerequisite. Otherwise a law is of no more validity than so much moonshine.

I want to call your attention to some of the cases, and first, as illustrating the general principle, I would call your attention to a case found in 26 Indiana Appellate Court Reports, page 279. This is a case where an act had been passed by the legislature of Indiana, which provided as follows:

It shall be unlawful for any person to haul over any turnpike or gravel roads at any time when the same is (are) thawing through, or is (are), by reason of wet weather, in condition to be cut up and injured by heavy hauling, a load on a narrow-tired wagon of more than twenty hundred pounds, or on a broad-tired wagon of more than twenty-five hundred pounds, and any person violating the provisions of this act shall be fined not less than five dollars nor more than fifty dollars for each load so hauled.

The court held that this act was of no validity whatever.

Mr. LITTLEFIELD. What was that, a criminal prosecution?

Mr. DAVENPORT. A criminal prosecution. This is the case of *Cook v. The State*. The court held that the act had no validity because there was no standard by which the court could determine what the width of the tire was.

Mr. LITTLEFIELD. That is, what was a narrow tire or what was a wide tire?

Mr. DAVENPORT. Yes; and it was held to be indispensable that every law of a criminal or penal character should have such a standard in it. The common sense of Mr. Towne brought that out; and I am astonished, myself, that the very capable gentleman who spent so much time in drafting this Hepburn bill did not discover this trouble in it. The court in this case in its decision said:

There must be some certain standard by which to determine whether an act is a crime or not, otherwise cases in all respects similar tried before different juries might rightfully be decided differently, and a person might properly be convicted in one county for hauling over a turnpike in that county, and acquitted in an adjoining county of a charge of hauling the same load on the same wagon over a turnpike in like condition in the latter county, because of the difference of conclusions of different judges and juries based upon their individual views of what should be the standard of comparison of tires, derived from their varying experiences or the opinions of witnesses as to what difference of width of tires would constitute one wagon a narrow-tired wagon and another a broad-tired wagon.

Then they go on to illustrate it. It so happens that this identical question has been before the Federal courts and has been passed upon. Prosecutions and proceedings have occurred under a law containing such provisions, and have been thrown out of court, and I would first call your attention to the case of the Chicago and Northwestern Railway Company *v. Dey et al.*, to be found in 35 Federal Reporter, beginning at page 866. The opinion was rendered by Mr. Justice Brewer.

Mr. LITTLEFIELD. What was the date of that?

Mr. DAVENPORT. This was July 27, 1888.

Mr. LITTLEFIELD. Was that while he was a district or circuit judge?

Mr. DAVENPORT. Circuit judge.

Mr. LITTLEFIELD. Before he went on the Supreme Bench?

Mr. DAVENPORT. Yes; and he has had occasion to consider it since.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. At page 875, in his opinion, the court says:

The next proposition of complainant is that the law is a penal one; that it imposes enormous penalties without clearly defining the offenses. It will be observed that section 2 requires that all charges shall be reasonable and just. Section 23 provides that if any railroad company shall charge more than a fair and reasonable rate of toll, or make any unjust charge prohibited in section 2, it shall be deemed guilty of extortion, and, by section 26, be subject to criminal prosecution, with a large penalty. Now, the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate it shall be deemed a criminal and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable charge.

That is precisely the trouble that Mr. Towne adverted to. The court continues:

If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In *Dwar. St.*, 652, it is laid down "that it is impossible to dissent from the doctrine of Lord Coke, that acts of Parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters." See also *United States v. Sharp* (Pet. C. C., 122); *The Enterprise* (1 Paine, 34); *Bish. St. Cr.*, sec. 41; *Lieb. Herm.*, 156. In this the author quotes the law of the Chinese penal code, which reads as follows:

"Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows."

There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate. See another illustration in *Ex parte Jackson* (45 Ark., 158). On the other hand, it is contended by defendants that the law, taken as a whole, makes the commissioners' schedule the test, and that the State is estopped to say that any charge equal to or less than that prescribed in the schedule was unreasonable. With such a construction there is definiteness and certainty, and the other provisions are a mere act of favor to the railroad companies, enabling them in case a charge above the schedule rate is made to show that such higher charge was in fact reasonable, and therefore the party guilty of no crime. (*Railroad Co. v. People*, 77 Ill., 443; *Sorrell v. Railroad Co.*, 75 Ga., 509.) Another proposition of complainant is that the provisions making the schedule *prima facie* evidence in all suits is an infringement of the right to trial by jury guaranteed by the constitution of Iowa, and those provisions of the Iowa and Federal constitutions to the effect that no person shall be deprived of property without due process of law; the argument being that in trials by jury all questions of fact are to be determined by a jury, and should not be prejudged by the section of any other board or officer; that the State should be compelled to prove that the charge was unreasonable, and not compel the defendant, after this *prima facie* evidence, made by strangers to the litigation, and not from examination of the facts in the particular case, had been received, to prove that the charge was unreasonable. In support of this contention the cases of *Plimpton v. Somerset*, 33 Vt., 283; *Francis v. Baker*, 11 R. I., 103; *State v. Beswick*, 13 R. I., 213, are cited.

Again, the law of Arkansas made it a crime for anybody to commit an offense against "good morals." A man abandoned his wife and children under outrageous circumstances, and he was proceeded against under that statute, and the supreme court of Arkansas said that such a law was of no validity whatever, because it did not define according to any standard wherein the offense against "good morals" consisted. If I have time I later shall want to point out to the committee wherein such a law as that is not only void for uncertainty, but is also void under the Constitution of the United States.

Mr. STERLING. Would that criticism not apply to the railroad-rate law which we passed three years ago? I think the same language is used in that.

Mr. DAVENPORT. I am about to call your attention to that, and I am about to call your attention to other cases. In this case contention was made that there was a standard fixed in the law, and the judge discussed that question on that subject.

Mr. LITTLEFIELD. You mean the case in which Judge Brewer rendered the decision?

Mr. DAVENPORT. In 35 Federal Reporter?

Mr. LITTLEFIELD. Yes.

Mr. JENKS. Will you give me that reference to the Arkansas case you spoke of?

Mr. DAVENPORT. It is *Ex parte Andrew Jackson* (45 Arkansas Reports). This same proposition came up again in the circuit court of appeals before Brewer, circuit justice, and Caldwell, circuit judge, in 1892, in the case of *Tozer v. United States*, found in 52 Federal Reporter, page 917. The facts are thus stated:

George K. Tozer was indicted for a violation of the interstate commerce act (section) prohibiting undue preferences. The court sustained a demurrer to the fourth count, and the defendant was convicted under the second and third counts. The court subsequently denied defendant's motion for a new trial and in arrest of judgment, and from the judgment of conviction the defendant brings error.

Mr. Justice Brewer delivered the opinion of the court. He said:

But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of *Chicago and Northwestern Railway Company v. Dey et al.* (52 Fed. Rep.) I had occasion to discuss this matter, and I quote therefrom as follows.

The court then quoted the part of the Dey case which I have already read to you, and then continues:

Applying that doctrine in this case, and eliminating the idea that the through rate is a standard of comparison of the local rate, there is nothing to justify a verdict of guilty against the defendant.

You know the Southern States have been quite active in enacting laws with regard to unreasonable rates, and this matter came before the supreme court of the State of Kentucky in the case of the Louisville and Nashville Railroad Company *v. Commonwealth*, to be found in 99 Kentucky Reports, commencing on page 133. Judge Hazelrigg, delivering the opinion of the court, said:

The indictment in this case charges that the appellant "did unlawfully charge, collect, and receive from A. Vancleave & Co. the sum of \$41.70 as toll or compensation for the transportation of a carload of coal, weighing 53,800 pounds, being at the rate of \$1.55 per ton, from Pittsburg, Ky., to Lebanon, in Marion County, over the

line of said railroad, a distance of—miles, the said rate of \$1.55 per ton for the said transportation of said coal being more than a just and reasonable compensation therefor, contrary to the form of the statute, etc.”

A conviction followed, and from the judgment on the verdict of the jury for the sum of \$500 the company has appealed.

Its complaints are that the statute prohibiting extortion by railroad companies, and providing a penalty therefor, prescribes no standard as to what is just and reasonable for the guidance of the corporation, and altogether fails to define what it may and what it may not do; that it is, therefore, void for uncertainty; that even if the statute is valid, the indictment states no facts showing the appellant guilty of the offense charged.

\* \* \* \* \*

The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in sections 816 and 819 of the Kentucky Statutes. The first-named section reads as follows: “If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or the use of any railroad car upon its track, or upon any track it has control of or has the right to use in this State, it shall be guilty of extortion.”

Section 819 fixes the penalty for the first offense at not less than \$500 nor more than \$1,000, and increases the penalty for subsequent infractions of the law. The circuit court of any county into or through which the road runs, and the Franklin circuit court, are given jurisdiction of the offense, the prosecution to be by indictment or action in the name of the Commonwealth, upon information filed by the board of railroad commissioners.

That this statute leaves uncertain what shall be deemed a “just and reasonable rate of toll or compensation” can not be denied, and that different juries might reach different conclusions on the same testimony as to whether or not an offense has been committed must also be conceded.

The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act the criminality of which depends not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

If the infliction of the penalties prescribed by this statute would not be the taking of the property without due process of law and in violation of both State and Federal constitutions, we are not able to comprehend the force of our organic laws.

In *Louisville and Nashville Railroad Company v. Railroad Commission of Tennessee* (16 Am. and Eng. R. R. Cases, 15), a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): “Penalties can not be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated the crime for which the penalty is inflicted must be defined by the lawmaking power. The legislature can not delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a ‘fair and just return’ on its investments, it must, in order to the validity of the law, define, with reasonable certainty, what would constitute such ‘fair and just return.’ the act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence can not know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent, while another might acquit an accused who had demanded and received at the rate of 6 per cent, rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms.”

The Supreme Court of the United States, in *Railroad Commission cases* (116 U. S., 336), refers to this Tennessee case and substantially approves it by distinguishing the case then before the court from the Tennessee case.



This case is also used to report the text in 8 Am. and Eng. Ency. of L. P., 935, where it said: "Although a statute had been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates this is a question which is a proper one for a jury."

Mr. LITTLEFIELD. That is a civil proceeding?

Mr. DAVENPORT. Yes, on another principle entirely, absolutely. If I had time I could illustrate the distinction. But to continue, the court goes on to quote from Mr. Justice Brewer in the case I have cited in 35 Federal Reporter and also in 52 Federal Reporter, and then says:

—When we look to the other side of the question we find the contention of the State supported by neither reason nor authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused.

A very similar case arose in the same court, and is to be found in 46 Southwestern Reporter, page 700, being the case of the Commonwealth v. Louisville and Nashville Railroad Company. There the question was as to a statute that provided against a corporation giving any undue or unreasonable preference or advantage to any particular persons, or locality, and the court held as follows:

It seems to us the opinion of this court in the case of Louisville and Nashville Railroad Company v. Commonwealth (35 S. W., 129) is decisive of this; for "undue or unreasonable preference or advantage to any particular person or locality" is just as indefinite and uncertain as the phrase "just and reasonable rate of toll or compensation."

It so happens that this question came up before the Supreme Court of the United States in a case from Kentucky, and they cited this Louisville and Nashville case.

Mr. LITTLEFIELD. What was that, a criminal prosecution?

Mr. DAVENPORT. No; a suit brought by the Commission.

Mr. LITTLEFIELD. To enforce a penal provision?

Mr. DAVENPORT. Yes. In the case of *McChord v. The Louisville and Nashville Railroad Company* (183 U. S., 498), having quoted from this case in Kentucky, the court said that the former law under which that decision was rendered having been found effective, it for that reason had been amended by later acts which set up the standard, and that the Commissioners could determine the rate, and having so determined, any charge in excess of that would be punishable, and they said that that act provided in itself, as amended, a standard by which the question of reasonableness or unreasonableness could be determined.

Mr. LITTLEFIELD. And on that ground sustained it?

Mr. DAVENPORT. Yes. Those cases, I think, are sufficient to illustrate the point and sustain the claim which I make, that if you wrote into this statute the word "unreasonable," as it is suggested by some friends of this legislation to do, or if you amended the act, as is suggested in the Foraker Act, by saying that it should be construed hereafter to relate only to contracts and conspiracies in unreasonable restraint of trade, or if you do as it is attempted in this act to do, make the determination of guilt hereafter and unlawfulness hereafter to depend upon the decision of the court that it is unreasonable, the act is a nullity. So I say that the scheme that is proposed in this act in that respect is as effectual an obliteration and destruction of the

Sherman antitrust act as if the enacting clause had been repealed. It is its necessary effect; and I believe, as the courts say, that no case can be found in the reports which would support the contrary position.

Mr. LITTLEFIELD. Your proposition is that when you import into the Sherman antitrust act the element of either reasonableness or unreasonableness, just at that time you destroy the whole law on account of the uncertainty created?

Mr. DAVENPORT. It is destroyed absolutely.

Mr. LITTLEFIELD. It renders it absolutely void as a criminal enactment. You have another proposition later.

Mr. DAVENPORT. There is further involved in this proposition the idea that the thing is contrary to the fifth amendment to the Constitution, because it deprives a person of property without due process of law.

Mr. LITTLEFIELD. Or liberty?

Mr. DAVENPORT. Due process of law means the law of the land, the general law laid down by the lawmaking body to define what a man may do and what he may not do; a rule of action prescribed by the supreme power in the state commanding what is right and forbidding what is wrong. That is involved in the very idea of due process of law, and this act infringes directly against that provision.

Mr. LITTLEFIELD. Your proposition is that under due process of law the criminal offense must be specifically defined so that a man may know in advance whether his act is obnoxious thereto, and if it is not so defined he may be deprived of his liberty without due process of law.

Mr. DAVENPORT. Yes; he may be deprived of his liberty or his property. Whatever you undertake to do you must do in accordance with a prescribed law, and what that law is must not be subject to the arbitrary decision of any person thereunder.

Mr. STEBBINS. You have quoted from several decisions of Mr. Justice Brewer on circuit. Do you remember what he had to say in his decision in the case of the United States v. The Northern Securities Company?

Mr. DAVENPORT. On that point?

Mr. STEBBINS. You remember his interpretation of the statute on the word "reasonable?"

Mr. DAVENPORT. That is as remote from the proposition I am discussing as possible. I do not wish to intrude myself on the committee's time too much, and I have collected the authorities for the convenience of the committee, and for all those who may hereafter have occasion to examine them, to see.

Mr. LITTLEFIELD. You reach the Northern Securities case a little further along in your argument?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. When you reach that, if Mr. Stebbins will renew his inquiry, you can answer it then.

Mr. DAVENPORT. Yes.

Mr. Low. Of course the meaning of the Sherman antitrust act as it reads now, unamended, is very inexplicit.

Mr. DAVENPORT. What is in restraint of trade within the meaning of that law the court can now say, but if you put in there the word "unreasonable," so that it reads "in unreasonable restraint of trade," it will be just like reenacting the Chinese law against whoever is guilty of improper conduct.

Mr. LITTLEFIELD. Is there any uncertainty so far as the provisions of the Sherman antitrust act are concerned, or is it a fact that there may be more or less doubt as to whether or not a certain state of facts is or is not prohibited by the Sherman antitrust act? That is, the law as it stands to-day is not specific and well defined?

Mr. DAVENPORT. Absolutely.

The CHAIRMAN. Although there may be some doubt as to whether certain states of fact are obnoxious to the law.

Mr. DAVENPORT. Whether certain things are in restraint of trade.

Mr. LITTLEFIELD. Of course.

Mr. DAVENPORT. The Supreme Court of the United States has said that they must be in direct restraint of trade. All these doubts that have been suggested by Mr. Towne as to what the Sherman Act prohibits are substantially dispelled by the past decisions of the Supreme Court itself.

Now, I want to come to a number of cases which bear upon the question whether or not the powers that are conferred upon this gentleman, the Commissioner of Corporations, who is to say whether these things are reasonable or unreasonable, conform to the requirements of the Constitution, which prohibits a person's property, life, or liberty being taken without due process of law; and perhaps it would be just as well for me to discuss that question broadly, because it covers several aspects of these various propositions which have been made here to amend this law.

Mr. LITTLEFIELD. You are just now starting on a new topic, and let me inquire whether you would prefer now to take a short recess for lunch or go on for half an hour?

Mr. DAVENPORT. I am entirely indifferent in the matter. I prefer to give way to Mr. Cowan.

The CHAIRMAN. Very well; let him proceed now.

#### STATEMENT OF MR. S. H. COWAN, OF FORT WORTH, TEX.

Mr. COWAN. I am here representing the American National Livestock Association, with headquarters at Denver, and the Cattle Raisers' Association of Texas, with headquarters at Fort Worth, for which associations I am attorney, and also I represent the Iowa Corn Belt Meat Producers' Association on this special topic, at the request of the secretary and manager of that organization. I wish to read three telegrams.

The first is dated April 9, 1908, Bakersfield, Cal., addressed to me at Washington, and reads:

The American National Livestock Association protest against the passage of the Hepburn amendments to the antitrust law. We expect you to do all you can to oppose the passage of these amendments.

H. A. JASTRO.

Mr. Jastro is the president of the American National Livestock Association. The second telegram is dated at San Antonio, Tex., April 9, 1908, addressed to me at Washington, and is as follows:

Enter protest behalf Cattle Raisers' Association against Hepburn amendments to antitrust law allowing railroads to pool competitive lines and exempting combinations of other corporations on approval of Commissioner of Corporations.

I. T. PRYOR,

*President Cattle Raisers' Association of Texas.*

The third telegram is dated at Des Moines, Iowa, April 9, and addressed to me at Washington. It reads as follows:

Please protest vigorously on behalf of Corn Belt Meat Producers' Association and farmers and feeders of Iowa against passage of the Hepburn amendment to the antitrust law.

H. C. WALLACE.

Mr. Wallace is secretary of that organization, and is the editor of "Wallace's Farming," a very extensively circulated farmers' paper published at Des Moines. I sent to these gentlemen copies of this bill as soon as I got hold of it, and asked their pleasure with respect to it, being here at Washington representing these associations in other matters.

The principal objection to this bill as it occurs to me, and I am satisfied as it will equally occur to all of the farmers and stock raisers of all that great Central West and western country, is the objection to the eleventh section. I do not mean by that to say that we would not object to the entire bill. We do object most seriously to it. I have not the slightest idea that any Congress will ever have the temerity to enact any such law. It would scarcely be expected that Congress would attempt to legalize trusts which have been defined as illegal by almost every State in the Union, which must operate in the State and be subject to its law; and for Congress to attempt to legalize would be the grossest absurdity, and it is scarcely possible that the gentlemen who would do it as Congressmen would last very long in their positions. They are probably aware of that, and I do not think there is the slightest danger of anybody in Congress undertaking seriously to enact this legislation, if he comes from a country where the people are distributed over the country and produce the wealth of the country out of the ground, who are subjects, the peculiar subjects, of the evil effects of combinations.

Mr. LITTLEFIELD. You refer now to the pooling section?

Mr. COWAN. These last remarks had reference to the entire bill; but I stated that the first and most material matter, which strikes us right full in the face, is the proposition to permit the combination of all the competing carrying lines of the country, for any purpose they may see fit to combine for, so long as the Interstate Commerce Commission does not hold it to be unreasonable for them to do so. I lay down the proposition as being one of universal belief among the people who are not themselves in anywise connected with and not subject to the influence of those who profit by the great combinations of the country, that they are opposed to combinations in restraint of trade. They will never consent to those combinations which some governmental agency will declare to be reasonable. They will never take the chance. They stand rather upon that principle announced by Mr. Carnegie, where he stated that in 99 cases out of 100 the object of the combination is to pillage the people, and the great farming and stock raising interests of the United States are the people most generally pillaged. The former secretary of the Cattle Raisers' Association of Texas, Capt. John T. Leiter, now dead, had a ranch in Texas and one over the line in old Mexico, and he had occasion to purchase a lot of barbed wire, for which in the United States he paid, I think it was, \$4.25 per hundred. Over the line in Mexico he paid for the same wire, carried 100 miles farther, \$3.25 a hundred. It is hard to convince people in those neighborhoods that a combination which can

do that may be a good thing in the country, and they will hardly consent that some agency of the Government shall declare that as the combination was reasonable they should therefore be licensed to pillage. I mention that by way of illustration. In 1887 the enactment of the interstate-commerce act marked the beginning of Congressional recognition of the combinations of corporations having to do with the public, and in that act they provided that railroads should not be permitted to pool.

The reason for that was very plain, for if railroads can themselves agree on a combination of the traffic or upon a combination of the earnings, or if they may consolidate with competing lines, they at once destroy all motives in their agencies for a good service; and you take a community where there is no competition between the railroads to secure your traffic, and you at once relieve the agencies of that railroad with whom you deal from any motive to treat you like other men are supposed to be treated in business. And it is an astonishment to me—perhaps “to me” ought to be stricken out, because it looks egotistic, but I hope it is not; I want the identity taken away from whatever I say—it is an astonishment to the country, to see a proposition contained in this bill to permit railroads to combine absolutely without the slightest limitation upon their combination, provided the Interstate Commerce Commission does not within thirty days declare the combination unreasonable. The very fact of the combination of parallel and competing lines in this country has been considered obnoxious to the best interests of the public from the earliest times when they undertook to combine. So universal has it been that in almost every State in the Union it is prohibited; and shall Congress undertake to enact a law now which will make it legal, which will inflict upon the country the injuries which were then foreseen, just because there is a desire that it be done, when the reasons for preventing it are tenfold greater than they were when the interstate-commerce act was enacted? Article 4529 of the Revised Statutes of Texas, enacted in 1887, the same year as the original interstate-commerce act, prohibiting consolidations, is as follows:

ART. 4529. *Consolidation prevented.*—It shall be unlawful for any railroad corporation or other corporation, or the lessees, purchasers, or managers of any railroad corporation to consolidate the stocks, property, works, or franchises of such corporation with, or lease or purchase the stocks, property, works, or franchises of any other railroad corporation owning or having under its control or management a competing or parallel line; nor shall any officer, agent, manager, lessee, or purchaser of such railroad corporation act as or become an officer, agent, manager, lessee, or purchaser of any other railroad corporation in leasing or purchasing any parallel or competing line. (Acts of 1887, p. 137, P. C. Arts. 419–422.)

In substance, that is the law of most of the States. How is it possible for Congress to authorize the doing of the very things which the statute of the State which creates the corporation prohibits, and which in our case are prohibited by the constitution of our State? Of course, I do not know what may have been the intent; I assume that it was a good intent.

The eleventh section of the bill provides as follows:

SEC. 11. That any common carrier under the provisions of the said act approved February fourth, eighteen hundred and eighty-seven, or the acts amendatory thereof or supplemental thereto, being a party to a contract or combination hereafter made, or any other party to such contract or combination, may file with the Interstate Commerce Commission a copy thereof, if the same be in writing, or if not in writing,

a statement setting forth the terms and conditions thereof, together with a notice that such filing is made for the purpose of obtaining the benefit of the provisions of this section. Thereupon the Interstate Commerce Commission, of its own motion and without notice or hearing, or after notice and hearing, as said Commission may deem proper, may enter an order declaring that in its judgment such contract or combination is in unreasonable restraint of trade or commerce among the several States or with foreign nations.

Then it provides

If no such order shall be made within thirty days after the filing of such contract or written statement, no prosecution, suit, or proceeding by the United States shall lie under the first six sections of this act, for or on account of such contract or combination, unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations.

Thus is repealed the antipooling clause, without the country knowing anything about it. It is not generally understood that there is any proposition here to amend what is known as the Hepburn bill by striking out the antipooling clause. What do you suppose would happen if someone introduced in Congress a bill that proposed to repeal the antipooling clause of the interstate commerce act? There would be such an overwhelming protest that it would be abandoned.

This does two things. It will effect the repeal of the antipooling clause because it permits a combination and recognizes it as legal and provides that no prosecution shall be brought under this act unless the contract is in unreasonable restraint of trade. Of course the contract will not be. And so it is all through this proposed act; if the contract or combination is itself reasonable, the law provides nothing with respect to the acts; and if the contract is reasonable, then whatever acts they perform are excepted out of the law, provided the contract is registered.

Mr. LITTLEFIELD. But are not the contracts and the acts to be considered together? The results of the contracts would be considered in reference to the determination, whether the acts were reasonable or unreasonable.

Mr. COWAN. I assumed that it was intended that if the contract was reasonable, then the corporation, being other than a railroad combination or common carrier, may register, and receive absolution so long as it is registered, and shall not be prosecuted for anything it does unless what it does is unreasonable. That was my construction. But the language is capable of the construction that the corporation should not be prosecuted in respect to such contract. That is the point I desire to make. It says "any action thereunder." "Thereunder" of course refers to the contract or combination, and I assumed that the intention was that the acts which would be performed by such combination could only be prosecuted upon in case they were unreasonable. I do not want to trench upon Mr. Davenport's theory, but I have had considerable to do with corporation law for many years; I was district attorney for a long while, and I thought I was somewhat educated in criminal law, and I think it is a principle of universal application in this country where the law must be defined, where the power to legislate can not be delegated, that the legislative department must prescribe the wrong, must define the acts which constitute the wrong, and in case of its failure to do so no man can be prosecuted for it. The right to fix the rule of conduct can not be committed to the jury nor to the court, because that would invade that fundamental prin-

ciple of government that we must keep separate the legislative, the judicial, and the executive departments. I undertake to say that if only prosecutions against unreasonable combinations or only prosecutions against unreasonable rates, in excess, of public-service corporations can be had, then that is equivalent to no prosecution, and being so, that the enactment of this bill in effect repeals the Sherman anti-trust act by the indulgence, as I may use that term, that it gives.

Mr. LITTLEFIELD. By the creation of the condition that makes it impossible to effectively enforce it; is that what you mean?

Mr. COWAN. Yes; the indulgence that it gives to those who register. It effectually repeals it as to them and leaves it in full force as to all those who are not registered, and the registration depends upon the sole judgment of one man as to whether it is reasonable or not. The absurdity could not be more fully argued than by the mere statement of the proposition.

Mr. LITTLEFIELD. The proposition now is to transfer the authority from the Bureau of Corporations to the Interstate Commerce Commission, which is a semijudicial body.

Mr. LOW. Anybody can register that wants to; and of course the Interstate Commerce Commission will pass upon the reasonableness or unreasonableness of the contract.

Mr. LITTLEFIELD. Yes; and he can have it registered if the contract or combination does not appear to be unreasonable.

Mr. COWAN. If he can get it registered he can not be prosecuted, but if he does not get it registered he can be prosecuted.

Mr. STERLING. If he does get it registered he can be prosecuted.

Mr. COWAN. He can be prosecuted under an indictment which can be held to be insufficient because the law would be held to be insufficient, as Mr. Davenport has stated. I do not care to trench upon Mr. Davenport's theory.

Mr. LITTLEFIELD. That does not go to the point whether the decision of the Commissioner of Corporations or of the Interstate Commerce Commission is conclusive on the question whether the suggested combination or contract is reasonable.

Mr. COWAN. No, sir. Referring again to the eleventh section, apprehending, as I have stated that this bill is not going to be, passed, that there is no probability whatever of its being seriously considered in Congress, I do not care to take the time of this committee in going into a detailed discussion of this matter with respect to the combination of carriers, except to here enter the protests of those whom I represent, and I guarantee that it will be universal.

Mr. LITTLEFIELD. You can state as fully as you like the reasons therefor. All those things will be illuminative to the committee.

Mr. COWAN. When the Interstate Commerce Commission recommended to Congress the enactment of some modification for the repeal of the antipooling clause of the interstate-commerce act, it did it for the reason that in certain instances rate wars were seriously injuring certain railroads, upsetting the business of the country; rebates were as common as postage stamps, and if the antipooling clause were repealed and the railroads were permitted under some sort of arrangement to pool, the motive for rebates and the rate wars, midnight tariffs, and such things, would be dispensed with; and that

was the reason the Interstate Commerce Commission advocated the repeal of the antipooling clause. That reason has been taken away by reason of the fact that rebates have been effectually prevented by the new law that has been passed. The regulation and the fixing of the rates thus has been made permanent, and rate wars have been entirely destroyed—they are gone. Now, for what reason it may be expected that railroads may be combined, except for the purpose of prescribing rates in common territory, I can not understand. I assume that that was the object of this section, because the railroads have not been asking for any pooling proposition. They have not been asking for the privilege of agreeing upon these rates, because they have been in open violation of the law, doing it since the decision of the Supreme Court of the United States that it was unlawful, without a single prosecution; and yet the matter has been laid before the Department of Justice time and again and the Interstate Commerce Commission has repeatedly held that it was unlawful, and the Federal courts have held that it was unlawful; yet there has been no prosecution: so that the railroads are not confronted with a proposition where they are demanding any right to combine.

Mr. LITTLEFIELD. Your proposition is that the Interstate Commerce Commission now has itself the power to fix rates?

Mr. COWAN. Absolutely.

Mr. LITTLEFIELD. And there is no reason why they should be authorized to fix them from a pooling proposition?

Mr. COWAN. None at all.

Mr. LITTLEFIELD. Inasmuch as they can control the whole situation through the law now in effect?

Mr. COWAN. Yes. Now, what have we left? These gentlemen are probably men of the best intentions. If you will go with me to the great plains of the West and the great farming districts and see how completely the business of the country depends upon the transportation and how much can be done to a community or to a man by failure to give him a reasonable service, you will see the absolute necessity of keeping up competition in service as the only competition we have left. The making of railroad rates by law, or the making of railroad rates through the medium of a commission, and the publication of those rates in advance means that there can be no competition, because when one road to a common point publishes its rates the other knows it and publishes a like rate. There is no motive for the one to reduce unless there is some local condition calling for it or unless it becomes necessary in order to induce the traffic to move; and there being no motive, the reduction is not generally made. But if it is made, the other road can meet it. So the result is that there are no rate wars, because the publicity of the rates prevents them. Then the Commission prohibits the advancing of rates, or may do so; that is to say, they may revoke a rate after it has been advanced. It is now proposed to enact a law, and it ought to be enacted, to give the Commission discretion to prevent an advance taking effect where it has been agreed upon, at least, so that the agreement of the parties is actually put into operation, although in violation of the law. The publication of the rates as prescribed by law, the power of the Commission to prescribe the rates as required by law, effectually destroys



all rate wars and all injuries by one railroad to another by unreasonable reduction of rates. And that was the only reason that has ever been urged for a repeal of the antipooling clause of the interstate-commerce act.

Mr. Low. May I ask Judge Cowan a question, Mr. Chairman?

Mr. LITTLEFIELD. Certainly.

Mr. Low. I quite understand the point that he is making, and I would like to ask, first, what injury he apprehends from giving railroads this opportunity to combine, in view of the fact that the Interstate Commerce Commission does fix the rates? It has been the opinion of some, at any rate, that this great consolidation of railroads has been brought about, perhaps to the injury of the country and the localities, by the very requirements that prevent trade agreements and other agreements of that kind, and it is that thought that has suggested this clause rather than any other. Do you think that the law as it stands has not worked toward the immense consolidation of railroads everywhere, and that if the law is left unchanged it will remain unchanged and will continue? Perhaps it is impossible, but our feeling was that the power of the Interstate Commerce Commission to fix rates had so modified the condition that possibly the public interests would be conserved by allowing that new right to the Interstate Commerce Commission.

Mr. LITTLEFIELD. Your question is, what harm would be done by enacting this section into law under the conditions you have suggested?

Mr. Low. Yes, sir; under the conditions; and would it not tend to prevent the very process?

Mr. LITTLEFIELD. And would it not stop the consolidation of lines and keep them independent entities under the conditions you suggest?

Mr. Low. Yes; and under the control of the Interstate Commerce Commission, instead of being consolidated into one great combination where they do pretty much what they like.

Mr. LITTLEFIELD. That is, you think that section would tend to do that?

Mr. Low. That was the thought.

Mr. LITTLEFIELD. And inasmuch as the Commission now has the control over the rates, what harm will the enactment of this section do? Do I get your statement right?

Mr. Low. Yes.

Mr. Cowan. That is what I was attempting to point out, that this section authorizes railroads to combine and pool their earnings. I will show you the harm it will do. Take an isolated case. I think we have six main lines of railroad from St. Louis to Fort Worth. The distance is a little over 700 miles, and there is an immense traffic carried between those places. Those lines of railroad are not consolidated as the Rock Island or the Frisco systems are consolidated, or the Missouri, Kansas and Texas and Gould lines and the connections that are made with the Santa Fe lines. Every line is trying to get trade. They have their commercial agents in our towns; they have their commercial agents at St. Louis. Every man is undertaking to give the best service that he can, as a means of inducing trade to go to his road. That gives the public the assurance of good service; at least it gives them the assurance of better service than they would have if that motive did not exist.

Mr. LITTLEFIELD. That is, they get more rapid dispatch?

Mr. COWAN. Yes; and good service is inseparable from the rate, because that is what the rate pays for, the service. I believe these gentlemen are easily convinced, when the right view is taken of it. I received a letter the other day from Colonel Pryor, president of the Texas Cattle Raisers' Association, asking me to apply to the Interstate Commerce Commission to see if we could get put in joint through rates by way of another line to St. Louis, because the Gould lines had recently established a fast line stock service to deliver at St. Louis with one unloading to feed. That means a dollar a head to the animals, and sometimes more. The railroads would not undertake to do that where they pooled their earnings. The service would not have been put in. They did not have to do it; they did it to induce the traffic to go over their line.

That would be the case with respect to handling fruits and melons and all sorts of products where it is necessary to give a reasonably prompt service. Permit all of the railroads between competing points to consolidate by pooling their earnings or anything of the sort and you would destroy the motive for giving this improved service. So far as the mere matter of rates is concerned, the President recommended a very sensible amendment to the interstate-commerce act, or to the antitrust act, namely, to permit the forming of traffic associations for the purpose of agreeing upon and publishing rates, inasmuch as the power is in the commission to regulate the rates, subject, however, to approval of those rates by the Interstate Commerce Commission before they become effective. Such a law as that the railroads are not asking for and they do not want, as I said, because they are performing business now exactly as they would be then, although it is in violation of law. So long as a man can do a thing, and he is certainly not going to be prosecuted for it, it does not matter much to him whether it is against the law or not. That sort of an amendment to the act would be reasonable and sensible and would do no harm; but an amendment which would give the railroad the right to combine parallel and competing lines would destroy the only competition that we have left; would be absolutely destructive of the best interests of the people who must patronize those railroads and to every growing community. With respect to some other provisions of the act there are a few questions I wish to propound to the proponents of the measure. First, suppose there was no national antitrust act, would that fact affect the validity of the State statutes, and is this bill so intended?

Second, where State statutes or constitutions prohibit combinations of railroads, can Congress annul them by authorizing such combinations? Is the bill so intended?

If the Congress can not affect the power of the State to prohibit corporations from doing business within the States and railroads combining, what is it that the bill reaches? If it is unlawful in a State to combine or to conspire in restraint of trade, can Congress make it lawful by any agency; and if not, to what extent can it do so?

If Mr. Carnegie is correct that 99 per cent of the combinations are for the purpose of depriving the public of competition, is it not unwise to take chances on permitting these combinations just because 1 per cent may be somewhat handicapped by the present law?

I believe it is the universal intention and opinion of the people I represent that the competition ought to be left free. They have suffered much because it has not been. We are an unorganized element of the community. We do not organize; we are too far apart. We can organize for some general purposes, but when it comes to organizing for the purpose of pooling our products and fixing a price on our products and undertaking to handle them in common, it is an impossibility. The varying circumstances and situations of stock raisers and farmers renders it an impossibility, and that is well illustrated by the attempt on the part of some of the farmers of Texas, and possibly some parts of Arkansas, to create a central agency for the purpose of disposing of their cotton and holding it for the purpose of getting prices. What happened to them? The cotton mills can easily get together and the cotton dealers who are at a particular place begin to pay less for the cotton. I do not know why it was, but they did, and the farmers very foolishly attempted to organize what in popular parlance would be called a trust to hold their cotton for 15 cents when it was selling at 12 cents, and the result is that it is down to 9 cents. They have all got a lot of their cotton left. As I say, we are an unorganized element of society, and it is that element of society which is most preyed upon. The others are preyed upon while they are doing some of the preying. It is true, that if by combinations prices are raised, if the cost of living is increased in every department, that reflects alike upon every individual. But those who do the preying, those who belong to the combinations, those who can fix prices, they get a part of the take-off to make up for that, whereas the unorganized element of society does not get it. If 99 per cent, as Mr. Carnegie says, of the combination in the country is for the purpose of stimulating returns, raising prices, and preventing competition, it seems to me that that at once calls for law to regulate it by prohibiting the doing of the unlawful thing. I admit that if you could define by law what is a good combination and what is a bad one, it would be wise to do it; but you might as well undertake to define who is a good man and who is a bad man, because you can not do it. You judge men by their fruits, and that is what you must do with corporations. Take men who manufacture coffins. It is said that they have fixed a very high profit on coffins.

Mr. LITTLEFIELD. When you speak of a corporation, is it an accurate use of legal language to use "corporation" as synonymous with "combination?"

Mr. COWAN. I have reference to combinations of corporations.

Mr. LITTLEFIELD. That is a different thing.

Mr. COWAN. I thank you for correcting me, Mr. Chairman. I do not mean by "combination," a corporation. It does not mean that at all.

Mr. LITTLEFIELD. You mean a combination either of individuals or corporations?

Mr. COWAN. Yes; but it is usually a combination of corporations, and that is why I am using that expression. It is difficult to pick out what would be a reasonable combination, unless you could pick out what that combination is going to do that will affect the public, and if we could know whether the combination is going to do something that

will seriously affect the public, we would know whether to prevent it or not; so that if we attempt to say in the law that all combination that is for the public good or that is not inimical to good morals shall be permitted to exist, and not be prosecuted under this law, all combinations will write contracts that contain that stipulation. Now, let us suppose, and I want to illustrate it so that it will be understood, that we take a combination of 20 furniture manufacturers making chairs. Mr. Towne used chairs as an illustration this morning. I should say that so long as they do not obtain an unreasonable profit by reason of the combination, the public is not hurt, provided they do not make use of their combination to put some other man out of business. We will say that there is a combination of corporations or individuals engaged in manufacturing coffins, and another one manufacturing school furniture, and another one printing and selling school books; how are you going to determine by law whether or not the existence of the combination is inimical to the public good? You can determine that by finding out what it does. You have got to track it like you track an animal in the snow, to find out what he does.

To know whether or not an animal is killing chickens, you have to track him and see. If an animal is getting into the henhouse and killing chickens, you do not want him to get out and run at large until you are certain that he does not do it. If you have a dog that kills sheep, you do not want to let him run out, and it is best to restrain him until you are certain that he does not.

Now, take the chairs. We find that the price of chairs has been advanced last year and year before and year before that by the men who had the chairs to sell, and not by the men who buy or use the chairs. The purpose of the combination was to utilize the facilities of manufacturing in large quantities, to concentrate their interests so that they could produce them cheaper, and we find the price of chairs in fact advanced. "Well," he says, "that is all right; the price of living has advanced, hasn't it?" "Yes." "The price of labor has advanced, hasn't it?" "Yes." "Then, why do you object to the advance in the price of chairs?" "Well, I don't want to pay so much for the chairs." "You want us to make a profit, do you not?" "Yes; we want you to make a profit." "Well, we had to advance the price of the chairs in order that we might make a profit."

Suppose this bill is in effect and we then come to the Department of Commerce and Labor and say, "This chair manufacturer is now violating the law; he is charging an unreasonable profit, an unreasonable price, for his chairs, and, to use the farmers' expression, we want to put the law to him." The Department of Commerce and Labor says "The contract is here on file and it is reasonable, and they only charge a reasonable profit." "How do you know they are charging only a reasonable profit?" "We do not."

"Then we will prosecute him and find out." You take the case then before a jury, and the court instructs the jury that the chair manufacturers, having filed their contract with the Department of Commerce and Labor, they are therefore not liable unless the jury find that it is in unreasonable restraint of trade. Thus it is turned over to the jury in each case to determine whether or not the chair manufacturers have violated the law. We are trying this chair

manufacturer over in Grand Rapids, where the chair manufacturer lives, and the jury probably is composed of men who have been working in the factory, or who live there and are interested in the concern and are getting some of the take-off, and they say, "No, it is not unreasonable at all." Then we go down into some county of Indiana or Illinois, and we indict them there and try them, and the jury finds they are guilty of violating the law. Now, what is the law in such a case? That brings into application Mr. Davenport's theory which, I undertake to say, is absolutely correct.

Mr. MARBURG. Is Judge Cowan aware of lines 18 and 19, on page 3 of this bill, where it says that the President shall prescribe "what information thereafter shall be furnished by such corporations and associations so registered, and he may prescribe the manner of registration and of cancellation of registration?" That is to say, after his contract has been passed upon, from time to time, the President may demand further information, and if the practices of the corporation are irregular he may prescribe means for its cancellation.

Mr. LITTLEFIELD. What is the inquiry?

Mr. COWAN. What is the question?

Mr. MARBURG. My question is, when Judge Cowan made the statement that the corporation whose contract has been accepted is then recognized as legal, whether he was aware that further information can be obtained from that corporation from time to time?

Mr. COWAN. Yes; I am taking the case now supposing that the individual is registered, and that he wants registration for his protection; what would happen? As he has registered, he could not be successfully prosecuted because of the uncertainty of the law, and I was bringing that concrete example up to the point of seeing what a man would undertake to do who wanted to be relieved from what started out to be a good combination. You would soon reach the price. When you come to determine whether a combination is in unreasonable restraint of trade, you can not determine it by the mere public opinion, by the opinion of the community, by the mere opinion of the jury; you must get down to some point at which it unreasonably restrains trade, and you soon reach the point of profit or the price.

Mr. LITTLEFIELD. Is there anything in it but the profit and the price?

Mr. COWAN. In this act?

Mr. LITTLEFIELD. Is not that all there is to it, the reasonable price, the profit?

Mr. COWAN. That is all there is to it.

Mr. LITTLEFIELD. What is the object of all the legislation, if it is not to protect the public against the exaction of an unreasonable price?

Mr. COWAN. A reasonable profit, a reasonable price; that is all there is to it. When we get to that, and you appoint an agent of the Government to determine whether or not it is unreasonable restraint of trade, that agency is to determine the price or point of profit, and when we have done that we have shaken this Government to its foundations. The public-service corporation is a different thing. We have always held that we can legally deal with a public-service corporation so. But in private business we can not regulate either the price or the profit, and when we attempt to do so we shake the

foundations of the Government as to the ownership of property, and you reach that point when you undertake to have a law passed which amends the Sherman antitrust act so that some agency of the Government shall determine whether or not the acts of a combination are in unreasonable restraint of trade.

They are unreasonable or not, dependent on the price or the profit, and that leads to fixing the price or the profit, and when we do that we have shaken the very foundations of the Government and the legal fabric upon which all of our industries are built. If Congress can fix the price, the State has as complete power as Congress in that particular. If Congress can determine whether an act is in reasonable restraint of trade, Congress can determine what is reasonable, and why can not the States do it? And in that we reach the very thing that was intended, no doubt, by this bill to be prevented. We are putting in the control of the Government the question as to whether you shall manufacture this or that, or whether you shall sell this or that, because you reach the point of saying whether a man shall be permitted to manufacture it and sell it at a certain price, so long as he is in combination with some other concern who do the same thing.

So for the two reasons—first, that you repeal the law when you inject the determination of the question of reasonableness into it as a penal statute, and leave us with no law on the subject so far as Federal laws are concerned, and, second, because you must reach the point of fixing the price, if you can enforce the law at all—neither this bill nor any other similar bill ought to be enacted. My contention is that competition is the life of trade. It is an axiom in commerce. It has been the one thing that has been attempted to be preserved, and we have had statutes enacted for the purpose of preventing its destruction. Now, to permit them to combine wherever they please if the combination itself appears to be reasonable and if the agreement purports to be an agreement to do reasonable things, and to carry out the combination if they only do things that are reasonable, involves, as I said, the provision to ascertain what is reasonable, and in the ascertainment of that we absolutely destroy competition by having fixed from time to time what things shall be sold at, and what profits may be made. It seems to me much the safest to permit this law to stand, except where the law itself may define some certain exceptions, and if a man who is affected by this act can not point out and define the exceptions that ought to be made so that the law can define it, so as not to leave it merely to some party who possesses greater power than was exercised by the priests in the days when indulgences were granted, no amendment ought to be made. Make an amendment where there is sufficient defined thought which points out what can be done. If you say that railroads may agree upon the rate, that must be coupled with the provision that such agreed rates shall not go into effect until approved by the Interstate Commerce Commission. There the law fixes the rate through that method, through the combined method of agreement and the act of the Commission. So it would be with respect to any public-service corporation, for we have the power to regulate the very thing that they do. If you open the door to pooling, pooling the earnings, and pooling the freight, combining the traffic of competing lines, you can not regulate what they are going to do, because the law does not regulate the service.

Mr. LITTLEFIELD. I suppose, Brother Cowan, that the power that authorizes the State to regulate the rates to be charged by a public-service corporation for its service is not the power that we exercise under the commerce clause for the purpose of regulating interstate-commerce carriers. They do not proceed on the same legal hypothesis.

Mr. COWAN. No; one arises from complete sovereignty on all subjects not taken away.

Mr. LITTLEFIELD. No; one rises from the granting of a charter, and the State having granted the charter has the power to regulate. The other proceeds upon the power to regulate interstate commerce.

Mr. COWAN. I have referred to public-service corporations engaged in interstate commerce. Of course, when I speak of the power of Congress to regulate a public-service corporation, I mean only so far as such a corporation is engaged in interstate commerce, and arising from the commerce clause of the Constitution.

Mr. LITTLEFIELD. That, of course, does not at all proceed from the power of the State to control the corporation chartered by the State?

Mr. COWAN. No.

Mr. BJUR. Is it quite clear that this section 11 does give exemption to a common carrier from the pooling provision of the law of 1887? It does not say so in terms, and while I had nothing to do with drafting the bill on reading it I do not see in the exemption given under this eleventh section anything with reference to the exemption from the pooling clause of that act.

Mr. COWAN. If it does not, it is easy enough to make it say so plainly. If this does not say that this section shall exempt a railroad company from the pooling clause, it is easy enough to make it say so.

Mr. LITTLEFIELD. It would undoubtedly cover a contract between railroad corporations.

Mr. DAVENPORT. Mr. Low said that was the object sought by the bill.

Mr. LITTLEFIELD. If it is not confined to any kind of contract made by common carriers, it would clearly cover all contracts, and hence it would cover pooling. This covers all contracts; it authorizes any contracts.

Mr. COWAN. I presume that it would; yes.

Mr. LITTLEFIELD. You would have no pooling without a combination or a contract. In terms, of course, it does not—

Mr. COWAN. Proceeding on the suggestion of the chairman that my parallel would not hold good—

Mr. LITTLEFIELD. I understand your generic proposition, of course.

Mr. COWAN. What I had in mind was this: There are certain powers of the General Government as to the control of the public utilities where they fall within the jurisdiction of the Federal Government. To fix the profit or the price it must not be supposed, because that power exists with respect to public utilities, that it therefore exists with respect to the combinations of manufacturers or producers.

Mr. LITTLEFIELD. Oh, no; that is an entirely different proposition. Of course, the essence of a public utility is that the corporation exercises a certain portion of the governmental authority.

Mr. COWAN. Precisely.

Mr. LITTLEFIELD. The Government, in other words, acts through the corporation, and in other words, has the right and power and responsibility, in fact, as to regulating the prices to be charged for the services rendered.

Mr. COWAN. Yes.

Mr. LITTLEFIELD. To illustrate the proposition you have in your mind, I suppose we could charter a railroad corporation to enter into interstate commerce.

Mr. COWAN. It has been done.

Mr. LITTLEFIELD. And they would be exercising a part of the governmental power, and that we could control them on the theory on which the State controls the corporations which it creates. But the railroads now are not regulated under that power, but under the power under the interstate-commerce clause. Do I make myself clear?

Mr. COWAN. Yes; and the United States Government only purports to control by virtue of the interstate-commerce clause. Of course there is a well recognized and profound distinction between what is known as a business corporation and a public-service corporation.

Mr. LOW. Of course.

Mr. LITTLEFIELD. That is what Judge Cowan had in his mind, as I understand.

Mr. COWAN. Yes. Now, to proceed another step. Assume that some agency of the Government, when determining whether a corporation is one that falls under the inhibition of the act or not, determines it by the ascertainment of whether or not it is charging an unreasonable price or making an unreasonable profit. In the determination of that fact necessarily there are involved the factors which must be considered before you can determine whether the price itself is unreasonable, and that involves the question as to whether or not, in the instance I gave, the advance in the cost of materials, the advance in the cost of production, justifies the advancing of the price which has been complained of, and that in turn involves the cost of labor, and you come down to the question as to whether or not this labor cost itself is in violation of the law, and we ascertain then whether or not there was a combination as between the laborers or the labor organizations to advance the price of labor and advance the price of the articles sold; and there is no end to the regulation of your business by the Government authority which is charged with determining whether or not in the first instance it is in unreasonable restraint of trade. You go from the point of unreasonable restraint of trade to its elements, namely, its price and profit. You go from that to the cost of production, and you go from that to the cost of the elements of the production, the labor and the materials, and you go from that to find out whether there has been a combination between all of them.

Mr. LITTLEFIELD. And more important, you go to the question as to whether there is an overcapitalization?

Mr. COWAN. Yes.

Mr. LITTLEFIELD. Whether there is an effort to declare profits on capital that does not exist?



Mr. COWAN. Yes. So that if it is the object to escape governmental regulation by this law, it is going exactly to the other extreme, at which there would be no end, if we undertook to do it as the law is.

At 1.30 o'clock p. m. the subcommittee took a recess until 2 o'clock p. m.

AFTER RECESS.

The subcommittee reassembled at 2 o'clock p. m., pursuant to the taking of recess, Hon. Charles E. Littlefield in the chair.

STATEMENT OF MR. S. H. COWAN—Continued.

Mr. COWAN. Mr. Chairman, the thing which is most to be feared by those whom I represent and those similarly situated is what will happen to them after a combination is once formed. It was the experience of the people which led to these enactments in the several States, and it seems rather strange that suddenly it should be discovered that it is unwise to prevent the combination itself. The law which merely regulates the manner of forming the combination, which apparently this bill does—and apparently it goes no further—and then ameliorates the punishment of certain persons, or rather exempts certain combinations where in the very formation of the combination there appears to be nothing unreasonable, does the damage, as we conceive it, without affording any remedy so far as Federal legislation is concerned. It would strike me, professionally speaking, as a strange anomaly for the Federal statutes to permit the doing of a thing with respect to interstate trade between Missouri, Kansas, Oklahoma, and Texas which is prohibited by the laws of each of those States; and yet if the Federal statutes had any force that is precisely what would result as to that trade which was confined to those States, because in each of them the antitrust act is very stringent, and the things which are prohibited by the law are well defined, and so far as I know there has never been undertaken a prosecution which did not proceed from some defined law and on account of some act in violation of that defined law. I have with me the Texas statute, but I will not burden the committee by reading that. The purport of the State statute, very carefully considered, and not by men intent upon the destruction of a country or business, but intent upon protecting the whole people in every business—

Mr. LITTLEFIELD. What has been the effect of the enforcement of that law in Texas with reference to ameliorating the conditions that were sought to be corrected? Has it been of an encouraging and successful character, an advantage to your business in Texas? Of course this is a little bit aside from the discussion.

Mr. COWAN. I should hesitate to answer in the negative, and yet if I were called upon to point to the particular instances where the public had been benefited by the prosecution of any particular case, I do not call it to mind, unless it be the prosecution which has recently been had of the Waters Pierce Oil Company.

Mr. LITTLEFIELD. Is it your judgment that the enactment of the legislation itself has elevated the business conditions in that regard?

Mr. COWAN. Well, I do not know. I do not have any very well-defined idea upon that. I talk with a lumberman, and the lumber-

man tells me there is no trust, but I see lumber go up and up and up. He said it is on account of the increase in the price of timber land, but I find when you go to half a dozen lumber yards to get them to make a price on a bill of material which you want to use in the construction of some houses, the price is figured precisely the same, unless there is some mistake made in the measurement. And I find that almost everything that we buy is sold at the same price for the same houses. Whether there is any agreement between these people I do not know. They say there is not. There is talk of prosecution of those engaged in various lines of business, and I do not know what the proof would show, but there is one of two sorts of control of the prices of many commodities in our State, and, being somewhat familiar with the entire West, I will say that is so all over, and that is, there is a combination which fixes the price, or there is a commercial control which does it. That brings to mind the thought that when the Government through an agency or the State through an agency attempts to determine whether in a given case the prices which have been charged to the customer are the result of a combination or the result of commercial control and commercial forces, it will be impossible to determine it as a fact, although a person might express an arbitrary judgment upon it. I can not tell whether the price of lumber is fixed by the mills first to the retailers and then by the retailers as to the profit they will take or the price they will sell it at, but I do know that the lumber went up immensely; and yet I know that when the financial panic came on—indeed, before that when the consumption of lumber somewhat declined—the prices of lumber went down. I believe that is the case in almost every item. So that when we undertake to clothe the Interstate Commerce Commission with the power to determine whether the acts of a given combination are reasonable or not, they will be confronted with that difficulty which renders it almost impossible, if not impossible.

We have not enforced the antitrust law in Texas more than in most of the States. No business has been injured by it, in my opinion, unless it be said that the business of the Waters-Pierce Oil Company has been injured. Indeed, that looks pretty high, to fine them \$1,600,000. But I assume there is no intention by the passage of this bill to actually exempt from prosecution those trusts which have been inimical to the public interest and have destroyed all competition. Yet that, in our opinion, would be the result. As I said before, the question was asked, What would happen to us after the combination was formed? If, Mr. Chairman, with the restrictions upon interstate combinations in restraint of trade—and when I use the term "combination" I am using it in the sense in which it is used in these acts—and if with the enactments in the various States, if with the prosecutions that have been brought in various States and the agitation of the subject, the great combinations which we all know to exist throughout the country could have grown up and business have become concentrated so that there is no competition that we can observe in the manufacture and sale of a great many important articles that go into the everyday use of everybody, what might we expect if these laws had not prohibited these combinations? It looks to me as though it is the poorest time possible to take absolutely the back track and practically repeal those statutes so far as

Congress is concerned—to invite combinations upon the condition that what they do will not be unlawful if it is not unreasonable. As I said, what we are afraid of is what will happen to us when once the combination is formed, and it affords us no satisfaction to say that no combination shall be formed except one that is in reasonable restraint of trade; that if in unreasonable restraint of trade it shall not be formed. As I said a while ago, when formed it will have all the appearances of being reasonable. If, as stated by Mr. Carnegie in his letter—and I am very glad that letter is introduced here—in ninety-nine cases out of a hundred—

Mr. LITTLEFIELD. I could not find that in his letter.

Mr. COWAN. I am sure I am correct in that.

Mr. LITTLEFIELD. Yes; I see it now. He says:

In ninety-nine cases out of a hundred it will undoubtedly be to rob the community of its right to the benefits of free competition, disguise it as we may; therefore the Commission's duty is to obtain satisfactory proof that the application is to cover an exceptional case.

That applies to everything, as I understand it, except steel rails.

Mr. COWAN. What Mr. Carnegie said, in his position in life, and considering his generous disposition, may be taken as a standard. It seems very inopportune to suppose that it is the intention of State legislatures or the intention of Congress to injure really any business operations in the country. I want also to point out particularly that we are interested in what combinations might be formed under this new law. We can not tell how many are prevented. The law in my State against larceny has undoubtedly prevented a great deal of larceny, but it is impossible to tell how much; but it ought to be prevented, and it is a case where the ounce of prevention is worth a pound of cure. Here is an article which I want to read as a part of my remarks, taken from the Washington Post of April 10. It appears to be an Associated Press dispatch. This reads as follows:

BELLEVUE, OHIO, April 9, 1908.

John H. Clarke, general counsel for the New York, Chicago and St. Louis Railroad Company, addressed a largely attended meeting of railway employees here to-night, taking for his subject recent railway legislation and its result. Mr. Clarke said, in part:

"There are 150 bills now pending in the two Houses of Congress, every one of which proposes in some manner to regulate the control of the owners and managers of railroads over their property. When we add to these the much greater number in the aggregate of similar bills pending in the legislatures of the various States, it needs no appeal to the imagination to make it clear that the widespread hostility to railroad property which this rage for legislation shows exists throughout the country must, unless it be speedily arrested, result in legal conditions in many, if not all, the States, comparable to what may now be seen in Oklahoma and Texas, where the only protection of railroad properties from confiscation is receiverships within the protection of the courts.

"The wages of fully 2,000,000 men are directly dependent upon the prosperity of the railroads of the country, and the welfare of fully 2,000,000 more is indirectly also in a large measure dependent upon them. How mistaken, therefore, mistaken beyond measure, are the men who continue to assail the railroads of the country as if they were a public enemy which it is their duty to embarrass or destroy.

"I, for one, gentlemen, am not willing for one moment to believe that it is not possible to unite the railroad forces of the country in defense of their employment in such manner as to meet and defeat the cunning of the politicians of the country in their unjust assaults upon this greatest single industry of the land, with the exception only of that of agriculture.

"I have been widely represented as favoring a new political party to be organized with the 1,500,000 railroad employees of the country as a nucleus. Nothing could be

be farther from my thought. What I should like to see is a league of the owners, managers, and employees of the railroads of the country organized, not to act independently of the two great parties, but to act with utmost independence within them both in choosing for support only candidates for State and Federal offices who have capacity enough to see that capital and labor are not enemies."

I wish to make some comments upon that. The first is that he wishes to see the railways and their employees united for their defense. Now, in a general sense that is all right; but suppose, Mr. Chairman, that there should be a united organization of the railroads and their employees wherein they propose to advance rates because they all agree that the rates are too low. Of course the Commission can regulate the rates; but suppose that the Commission should not regulate the rates, and they get united for that purpose. Who is it that must suffer? I could point to a number of instances in which, when application was made for the advance in railroad wages, the railroads have postponed the day of fixing the advance in the wages until they had advanced the rates. That may have been justifiable; I am not going to say that it was not; probably it was. It may have been; but the danger is in allowing such a power to exist, and that is the danger in ameliorating, as it is stated, the effect of the antitrust law. The statement that the only protection that the railroads have in Texas and Oklahoma is in receiverships I deny. There has been one receivership of a railroad in Texas, and that property belongs to the Gould estate. It has never been a very good earning property, but when it was built the State of Texas gave it 20 sections of land to the mile, and exempted it from taxes for twenty-five years, towns and counties gave donations, and in the total that was given to it there was more than every dollar that was ever put into the railroad. It was bonded for twice as much as it ever cost, and it has gone through two or three receiverships, and in every case every dollar that is in the securities has been brought down, and now I understand that the receivership was brought on account of the third-mortgage bonds which were issued for the purpose of taking up certain indebtedness. We are not assuming an attitude toward railroads as if they were public enemies.

Our State has passed a number of consolidation bills, but in those cases the legislature discusses it, people who desire to appear, patrons of the roads, appear and are heard, and we have permitted consolidation of railroad properties in almost every session of the legislature for several years. There ought to be no bill passed which allows any commission to consolidate railroads. We do not allow it in Texas. We leave it to the legislature, who are responsible directly to the people. And so if Congress thinks there are cases in which the railroads ought to be consolidated, and I have no doubt there may be such, let Congress assume the responsibility. They are responsible to the people. Do not give it up to a commission appointed, who are not responsible directly to the people. Do not leave it to be decided on the point whether it is reasonable or unreasonable. Let Congress assume the responsibility and not give the Commission the power to do a thing which it would not do itself, and which it can do as well as a commission can do. If we want railroad combination and consolidation, let it be by a special act of Congress which permits what Congress has the power to permit, and stop it at that, and leave the bal-

ance of it to the legislature which creates these corporations, which gave them their franchises, which enables them to take under the law of eminent domain, which protects them in their property, prevents its destruction, and levies taxes upon them. I say that there ought never to be put into this antitrust act any right of railroad combination in this country; that Congress ought not to act in the matter except in those particulars where it may act, and ought not to authorize anybody else to do it. Leave it to the judgment of the Congress of the United States as to what railroad combinations there ought to be, so far as it is within the jurisdiction of Congress, and let the legislatures of the States do as they see fit with respect to what is in their States.

As to the other features of the bill, aside from the railroad feature, we are vastly interested. The people whom I represent are consumers. Suppose that the Interstate Commerce Commission were to undertake to determine the one question as to whether or not the Standard Oil Company, and various other oil concerns, were charging an unreasonable price for oil. Of course, considering the odiousness that the Standard Oil Company seems to have, it might not take long to reach a decision in that case; but if the steps were pursued to do it, what would you find? You would find in one locality a standard price for oil. You would find in another locality a lower price. Why? Because of competition. Can the Commission say that that is unreasonable, to make a lower price because of competition? You would find in another locality still a different price. You would find various degrees of competition, dependent upon the situation. Then in Kansas you would find a law which prohibits the sale of oil cheaper in one town than it is sold in another, plus the cost of carriage. That is in order to keep oil concerns from running into a town and running the dealers out, and so on. How long would it take the Interstate Commerce Commission to do that? And then after they did it, and there was a little change in this locality or that locality in this great United States, how long would it take them again to find out whether they were violating the antitrust act under this act which says "unreasonable restraint of trade" is the only thing that is prevented? Take sugar and tobacco and steel, and wire, even; think of them. Mr. Carnegie has an interest in steel somewhere, I believe. Then take nails and lumber and flour and cotton piece goods and coffins and chairs, and various sorts of furniture; and then go into the meat and live-stock business. Take it with the retail butchers in New York in handling interstate traffic. It is an absolute impossibility, Mr. Chairman, to conceive that it is possible for the Government to get down to the point of determining whether the prices and profits of business in this country are reasonable, and without that it is utterly impossible and inconceivable that anyone can arrive at a conclusion as to whether a restraint of trade is unjust and unreasonable.

That being so, it is perfectly certain that the wisdom of those who framed the Sherman antitrust act was not less, to say the least of it, than that of those who now want to amend it. Their patriotism was the same. We have back of the proposition that restraint of trade shall be prohibited the enactments of the legislature of almost every State, and it has been stated by some one that when we con-

sider carefully the opinions of others who have given careful consideration to a thing we act as intelligent beings. We can not upset the laws of the States; we can not deprive them of the regulations that they have got the power to enact; we can not provide ourselves with the means to learn what is an unreasonable restraint of trade unless we invade the private business of any man in this country who is of a mind to agree with anybody else, so as to make a combination. That being so, it seems to me that the better thought ought to prevail and this whole subject be dropped, and let us go along as we have been going, assuming that the producers in this country of manufactured articles have been getting a shade the best of it over the people who produce the farm products all the time. It is the organized element of society that are getting the best of it now, and they seem to be anxious to have some sort of amelioration of a bad law. I do not believe it is a bad law. I believe the time has come when we have got to prevent combinations of capital and skill and otherwise which deprive the unorganized element of society of their proper degree of protection, which prey upon them by charging them whatever the seller is a mind to, and paying them whatever figure the buyer names. That may not be precisely so. It is not in most instances, because there is competition. You take, for example, the live-stock business. We will go into one great market. Take my town, Fort Worth. We have two buyers, Swift and Armour. They own all the facilities there. They own the stock in the stock-yards company. They own all the buildings. They own everything there is about there, and they run two packing houses. But we can ship cattle to Kansas City and Chicago and St. Louis and other markets.

There are no buyers at our place for export. There are a few buyers for outside killing points. But when we reach Kansas City and Chicago, St. Louis and Omaha, we find the buyers for the outside points. There are more buyers at Chicago than elsewhere. A great many cattle, 40 per cent of the cattle sold in Chicago, or something near that, are bought to be shipped to interior points. The market at Chicago, being the chief market, controls the market at the other places, so that these buyers at the other markets have to buy at the prices fixed there, minus the cost of carriage. But if that competition did not exist in the business world they could pay just about what they pleased at Fort Worth, if we had no railroads to ship them on. So that you can see how important it is to the interests I represent that, so far as may be, the men who produce, on the thousands of farms and ranches, this live stock, cattle and hogs, that go to make the meat supply of this country should be protected against those combinations which they do not know anything about until the thing has happened to them; and we can not afford to say that the law, however fair it may appear, can with our consent be enacted which will place it in the hands of any Government employee or anybody else, however great or good he may be, to say that the thing may exist, when our experience teaches us that the existence of the thing is detrimental to the best interests of the community. So we believe that the existence of the combination itself, the very existence of it, is the danger point, and that it will not do to let it exist and then undertake to control what it does.

I think that is all I have to say on this subject, and I do not believe that there is a response from the great public in this country in the direction of undertaking to define between good and bad trusts, but I do say that if any gentleman can present to us a bill which will define those which, according to the definition—the definition being specific—are beneficial to the public interest, they will find nobody more ready to aid in it than the producers of live stock in the West whom I represent. But let whatever law there is define the exceptions they want put into the act.

Of course there are a number of other things here. Some say this will permit a boycott and others say that it does not. I do not know. I do not believe in the principle of the boycott myself, and we are not employers of labor; but it is prohibited by the statutes of most of the States, and I have seen instances in which I thought it was a very grievous, injurious thing to a community. I have seen instances in which perfectly legitimate business was put entirely out of existence by it. It may be that in some instances it is justifiable; no doubt it is; but it ought to be dealt with with great care, and only those instances in which the exceptions can be defined where it ought to be used ought to be put in. Of course, when I speak of a boycott I am not speaking of a labor boycott. Take, for example, our live-stock markets. I know of several instances in which private individuals who did not join the live-stock exchange where the commission men were selling the live stock could not deal because the other commission men would not deal with them, and because the other commission men would not deal with a buyer who dealt with them, and absolutely they were put out of business and run out of town by it. Now, when you come to dealing with that subject of a boycott you are not merely dealing with a labor boycott, but you are dealing with an infinite variety of cases. The boycott is prohibited by the laws of every State, and it is clearly within the police powers of the State to do it; and when you come to the subject of legalizing it it is an extremely dangerous proposition. In other words, Mr. Chairman, I am satisfied that this bill has not been given that careful consideration which the subject demands, and that it ought not be insisted upon and probably is not insisted upon at this session; but if it is to be insisted upon at the next session let the responsibility rest with Congress and do not let it rest with a commission appointed to draw a law for Congress where Congress is responsible directly to the people. There are many signs of our representative form of government growing into a government by men, by the discretion of men. While I have been in favor and our people have been in favor in every instance of laws which gave the power to fix rates of carriers and to regulate them where it is impossible for the law itself to do it, we realize that such innovations on the sphere of the Government ought not to be made except where the necessity is urgent, and I think it would be fraught with great danger to undertake to launch a law which may, and as we contend does undoubtedly, leave to an individual a power which was rarely exercised by kings.

Mr. JENKS. I think it would be of interest to the committee to know a little more about these organizations Mr. Cowan represents. I understand these are large organizations. Will you tell us something about the management of them and their organization?

Mr. COWAN. The Cattle Raisers' Association of Texas is composed of over 2,000—I think 2,200, to be more exact—cattle raisers, men engaged chiefly in that business.

Mr. LITTLEFIELD. They are ranchmen, as a rule?

Mr. COWAN. Ranchmen and farmers. The business is becoming very much intermingled now. Many of them are feeders, also. The membership of the association is in Kansas, Texas, Oklahoma, and New Mexico, and then our members do business in the Northwest, in Montana, southwest Wyoming, and Colorado, and we have a number of men who do business up there. The American National Live Stock Association is an organization which is composed principally of other associations. For example, the Texas Cattle Raisers' Association is a member of the American National Live Stock Association; so is the Live Stock Association of South Dakota; so of Kansas and so of Iowa and so of Colorado, and there are a large number of distinct associations of separate men throughout the country that belong to the American National Live Stock Association. So it might be said to be a clearing house for all of the organized live stock associations with the exception of the sheep men. A great many of them are individually members, but we fell out with them about the control of the public range—we thought it ought to be free and they wanted to lease it—so that they are not in the organization extensively; but on these subjects we are all together. The Iowa Corn Belt Meat Producers' Association is the only large live stock association in the State of Iowa, and is a very extensive organization. They are all over the State and are organized in every county.

Mr. JENKS. Are these associations incorporated?

Mr. COWAN. Oh, no; they are just voluntary associations.

Mr. JENKS. For what special purpose?

Mr. COWAN. The original purpose of the Cattle Raisers' Association of Texas was the protection of the cattle raisers against the stealing and driving off of cattle, and such things as that, and gradually it has grown into the quarantine and all such things that affect them, and they have just evolved along the lines of necessity. We maintain now some 30 or 40 inspectors at the markets at various places to prevent the unlawful taking of another's property. That is to say, a great many cattle are shipped that do not belong to the man who ships, and they do not even know it, and it is very difficult to prevent it and very difficult to adjust these matters. These inspectors inspect the trains and they inspect the cattle in the markets and examine the brands, and if they find any that do not belong to the man who has shipped them, they cut the cattle out. There are more cases of mistake than otherwise, but, of course, there are some cases of stealing. They have been taking a prominent part in all matters of general public concern.

Mr. JENKS. Did they in any way attempt to influence the sale of the cattle as the cotton raisers have attempted to control the cotton?

Mr. COWAN. No. That has proven impossible to the cotton raisers. It is simply impossible. They are left to what they can get when they ship to the market, and they ship everything to the market and it is sold at the market price. We now and then have purchases made by buyers that come out into the country from the



packing houses, but as a general rule all the buyers of the packing houses buy right there when the stuff is shipped to them.

Mr. LITTLEFIELD. Are any of those gentlemen from Illinois present now? They wanted to go home on the 3 o'clock train.

Mr. LOW. None of them are here, Mr. Chairman.

Mr. LITTLEFIELD. Well, I have done the best I could to get them in.

Mr. DAVENPORT. If they come in I will yield to them.

Mr. LITTLEFIELD. Very well; proceed.

**STATEMENT OF MR. DANIEL DAVENPORT—Continued.**

Mr. DAVENPORT. When I suspended in order that we might have the very illuminating exposition of this matter which Judge Cowan has presented, I was about to direct the attention of the committee to certain constitutional objections to various provisions in the several bills, which would be destructive of this legislation. It comes up in this Hepburn bill in three ways. You know we have the fourth amendment to the Constitution, which was adopted to secure to every American citizen his rights of privacy, and we have the fifth amendment to the Constitution, which is intended to protect his property, his liberty, and his life from arbitrary action on the part of any government agency whatsoever, those amendments of course being confined in their operation, as the Supreme Court subsequently interpreted them, to the action of the Federal Government. In regard to this Hepburn bill, there are two or three ways in which those amendments are to be considered in their operation on it. In regard to this proposition of Mr. Gompers and others to be exempted from the operation of the law in precisely similar circumstances to those under which others are not exempted, it comes up in another way. I want first to call the attention of the committee, so that we can see the bearing of these constitutional provisions, to what is provided for in this Hepburn bill. It is not intended, so its advocates say, to change the substantive provisions of the existing Sherman anti-trust act, except so far as it lessens the amount of damages which a private party may receive for an injury inflicted upon his business or property by anything forbidden in the act, and in certain other provisions in the bill which change the substantive provisions so far as it relates to combinations between laboring men or employees, as they are termed, and employers. Otherwise the scheme is to maintain and preserve unimpaired the existing substantive provisions of the Sherman antitrust act. But at the same time it is proposed to exempt certain persons who fall under the condemnation of that law, if certain things are done by them. One thing is that a man must disclose his business in order to get the benefit of the act, by becoming enrolled. Another is that he shall subject, having become so enrolled and being on the favored list, the judgment upon what he is to do to the judgment of an administrative officer, and according as that judgment is one way or the other he falls under the provisions of the law as to contracts and combinations which are in reasonable restraint of trade—that is, he either gets immunity or condemnation.

Mr. JENKS. May I suggest that the word "may" should be used instead of the word "shall?"

Mr. DAVENPORT. Oh, there is nothing compulsory about it.

Mr. LITTLEFIELD. He may get immunity or condemnation?

Mr. JENKS. Yes, he may.

Mr. LITTLEFIELD. That does not affect the legal proposition.

Mr. DAVENPORT. This is aside from the side from which I intend to approach the question; but you will immediately notice that there is a class distinction introduced there, and some acts that are obnoxious to the substantive provisions of the law are punishable in one and precisely the same acts another is exempted from punishment for. In the next place, you will observe that the power of decision in that matter is given to an administrative officer of the Government. The difficulty with that kind of legislation is twofold.

Mr. LITTLEFIELD. They propose now to vest it in the Interstate Commerce Commission.

Mr. DAVENPORT. That is a mere change of tribunal, and it does not alter the legal effect of what is proposed.

Mr. LITTLEFIELD. Your proposition would apply just the same?

Mr. DAVENPORT. Yes. You have here the question propounded to you, Would this Hepburn bill be valid if passed? If not, of course it would be ruination, as a whole, to the existing law, for reasons not necessary now to be explained. In the first place, is it due process of law within the meaning of the fifth amendment to subject men to the adjudication of an officer of that character? Passing that question, is such legislation obnoxious to the provisions of the fifth amendment because it creates classes artificially? In other words, by the terms of this bill the same acts done by two persons are still to be criminal under the first section of the Sherman Act; but if one has done something to avail himself of the provisions of this bill, he is to be thereafter exempted from all prosecution by the Government for his criminal acts, while the other is not exempted. Is that forbidden by the fifth amendment? And the same question is involved, so far as that is concerned, in Mr. Gompers's proposition to exclude certain classes of persons from the operation of this Sherman Act. According to that, that which is criminal in one man or set of men under precisely the same set of circumstances is to be not criminal in another man or set of men; and that, of course, as I said when I was talking this morning, invites a discussion as to the fifth amendment.

We all know that in the fourteenth amendment there is a provision prohibiting the States from depriving any person within their jurisdiction of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws. The first part of that clause, that no person shall be deprived of life, liberty, or property without due process of law, is in the fifth amendment. We all know that the Supreme Court of the United States, in the case of *Connolly v. The Pipe Company* (189 U. S.), which was an Illinois case, held that the exemption of agricultural associations from the antitrust law of that State was forbidden by the fourteenth amendment, and that that invalidated the law as a whole.

Mr. LITTLEFIELD. That was on the ground that that particular statute was obnoxious to the fourteenth amendment?

Mr. DAVENPORT. Yes; that it was obnoxious to the fourteenth amendment.

Mr. LITTLEFIELD. Denying them the equal protection of the law?

Mr. DAVENPORT. Yes. The question that every lawyer has had to consider, and which will certainly in the near future come before the Supreme Court of the United States for decision, is whether the provision of the fifth amendment to the Constitution, which says that no person shall be deprived of life, liberty, or property without due process of law, does not import the same thing, and does not mean the same thing, as the fourteenth amendment.

Mr. LITTLEFIELD. That is, whether a man gets due process of law if he is deprived of the equal protection of the law?

Mr. DAVENPORT. That is, if a law is made which is partial in its operations in the way I speak of, whether that is due process of law; and it is to that point—of these two constitutional amendments, the fifth amendment and the fourteenth amendment—that I want for a short time to direct your attention.

Mr. Low. Does Mr. Davenport intend to say that this bill does not deal equally with everyone when everyone has a right to come before the Commission?

Mr. DAVENPORT. That is a matter for discussion later, which I will approach; but in the first place, we want to find out whether we have any constitutional provision that operates upon it at all, because it is my contention, and I think it is the judgment of those who have reflected upon it, that the condition in this bill which you impose upon a man to get exemption is also equally obnoxious to the fourth amendment as the invasion of that right of privacy which it was one of the great purposes of the Constitution to protect.

Mr. LITTLEFIELD. That is, the conditions involving the disclosure of information that he can not be required to disclose under the provisions of the fourth amendment?

Mr. DAVENPORT. Yes; and let me right here direct your attention to the effect of this bill. Any man is exposed under it to suits by private parties, not only suits at law but also in equity. You know there was for some time a doubt whether a private party could resort to a court of equity to protect himself from threatened injuries growing out of the provisions of the Sherman Act; whether it was not the intent of Congress to limit his private relief to his action in damages. But as I had occasion to call the attention of the committee to some time ago, that is not sound. In the case of *Bigelow v. The Calumet and Hecla Company*, in 155 Federal Reporter, the cases are carefully considered, and it was held that a private party had the right to go into a court of equity and enjoin a threatened injury to his business or property under the Sherman antitrust act; for if you will recall that in the case of *Minnesota v. The Northern Securities Company*, in 194 U. S., Mr. Justice Harlan carefully distinguishes between the right of a public official to resort to the courts of equity under the Sherman Act for the protection of the public against acts that affect the public alike and the right of a private party to go into a court of equity to protect himself from a threatened injury to his business resulting from such acts; the distinction being the same as that between proceedings in equity to protect the public from a public nuisance and to protect a private party from injury peculiar to himself; and I take it that there is no doubt longer in the mind of anyone that a party can resort to the Federal courts, and indeed

for that matter to the State courts, in equity, to protect himself from the unlawful acts—from the effect upon his business of the unlawful acts—prohibited by this Sherman antitrust act. He is not limited to his action for treble damages under the seventh section of the act. And this for very manifest reason—that the Sherman antitrust act is entirely silent about that being the exclusive remedy, or about its being considered an adequate remedy at law.

Mr. LITTLEFIELD. That is, it does not change that well-settled rule of law that while a remedy is given it does not follow necessarily that the remedy given is an adequate remedy.

Mr. DAVENPORT. That is it, exactly. I take it that this honorable committee will come, on reflection, to the conclusion that if this proposed bill is passed a party who has made a reasonable agreement or combination, a party who has made an agreement or combination which has the sanction of the Commissioner of Corporations or of the Interstate Commerce Commission, will still be exposed by its terms to attack, and if the combination that he has made or the contract that he has made, whether reasonable or not, is actually in restraint of trade, as that has been defined by the Supreme Court of the United States, that he can be sued by a private party. That being the case, the proposition involved in this proposed bill is that a person seeking exemption from public prosecution shall walk up to the Commissioner of Corporations and disclose that which will absolutely furnish the proof under which he can be mulcted in damages, or under which he can be enjoined from doing at the suit of a private party the very thing he asks permission from the Commissioner of Corporations to do. I am somewhat surprised, myself, that the very eminent gentlemen who took part in drafting or concocting this measure did not observe the unfortunate position in which the supposed beneficiaries of this law would be placed. Not to dilate upon that point any further at present, it is sufficient to say that there are grave reasons to doubt the constitutionality of such a condition as is imposed upon the party who seeks the benefit of this law; but if he does do this, he comes under a favored class.

Mr. LITTLEFIELD. They might raise the question that no one else could take advantage of the proposition, and if they relinquished their right to take advantage of it no one else could complain.

Mr. DAVENPORT. Well, that is another aspect of it; but the committee will remember that long course of decisions of the Supreme Court of the United States, beginning with the case of *The United States v. Boyd*, in 116 U. S., I believe, and ending with the case of *Hale & Henkel*, quite recently, as to the interpretation of the fourth amendment, and that a man was protected by in it. And I throw out in this connection this observation, that this legislation is by no means free from trouble from the fourth amendment to the Constitution. But we will pass that. A man says, "I do not care to avail myself of that." Another man says, "I do avail myself of it." Instantly by the act of this administrative officer, so far as the first six sections of the Sherman Act are concerned, proceedings by the Government, proceedings in equity or by criminal prosecution, are suspended as to him who has availed himself of it by making disclosures, but the other who does not avail himself of it by making disclosures and who has good

and justifiable reasons, reasons that can be justified under the fourth amendment, for refusing to avail himself of, is to be punished.

Mr. LITTLEFIELD. That does not necessarily establish their guilt. That places them in a place where they can not plead the immunities.

Mr. DAVENPORT. They are both guilty.

Mr. LITTLEFIELD. You proceed on that assumption of the facts?

Mr. DAVENPORT. That is the whole scope of the bill. They are all under the condemnation of the law, but one shall not be prosecuted if he shall pursue a certain course, while the other man shall be prosecuted if he does not pursue that course.

Mr. LITTLEFIELD. You are assuming as the basis of that hypothesis a condition where they are both violating the law?

Mr. DAVENPORT. They are both violating the law.

Mr. LITTLEFIELD. For the purposes of your illustration you assume that.

Mr. DAVENPORT. That is the very purpose of this proposed bill, to maintain unimpaired the existing provisions of the Sherman antitrust act, except so far as it relates to the modification in the seventh section, providing for single damages instead of treble damages, and the exception in regard to employers and employees and arrangements made between them, that law is to stand in full force, and any man who does not avail himself of these conditions can be prosecuted for a contract or combination, even in reasonable restraint of trade.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. And the other man would be prosecuted for the same thing did he not pursue the course prescribed in order to get immunity.

Mr. LITTLEFIELD. Their proposition is that he can do that, and that the failure of the Commissioner of Corporations to hold that it is unreasonable is simply prima facie evidence that it is reasonable. That is the way I understand it.

Mr. DAVENPORT. If he holds that it is unreasonable, the guilty party is prosecuted for the unreasonable part only.

Mr. LITTLEFIELD. If he does not hold that it is unreasonable, that is a negative affirmation.

Mr. DAVENPORT. That is, he is to be prosecuted if it is unreasonable.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. But I am speaking of those offenses under the present law which Mr. Towne spoke of, where it is in reasonable restraint of trade. For reasonable restraint of trade they are both subject to prosecution. The object of this bill is to excuse one from the prosecution. The guilt is the same, but, as Judge Cowan said, a dispensing power has wiped out as to him the process against him.

Mr. LITTLEFIELD. If their theory of the bill is correct, it is all wiped out. They say that the determination of the Commission that a contract is reasonable is only prima facie evidence; and does that mean anything more than a presumption of innocence?

Mr. DAVENPORT. That is another proposition, I may suggest. The question here is where the commissioner says it is reasonable.

Mr. LITTLEFIELD. But he does not say, in any event, that it is reasonable.

Mr. DAVENPORT. He gives them exemption so far as he can from the operation of the law. The law is still the same.

Mr. LITTLEFIELD. Yes; unless he comes to the determination that it is unreasonable, it is equivalent to a holding that it is reasonable. They claim that that is only *prima facie*, and that he may still be prosecuted.

Mr. DAVENPORT. If it is unreasonable.

Mr. LITTLEFIELD. Certainly.

Mr. DAVENPORT. But suppose it is reasonable?

Mr. LITTLEFIELD. That is another proposition.

Mr. DAVENPORT. That is the proposition I am talking about.

Mr. LITTLEFIELD. If it is unreasonable, while the determination is not conclusive, if it turns out to be reasonable then they get immunity.

Mr. DAVENPORT. But if they do not undertake to get this determination which will exempt them, then they are prosecuted if it is reasonable.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. Now, I think we are confronted with the fact that the man who does not get exemption under this law is exposed to prosecution for a reasonable agreement. A man in precisely the same circumstances as to the commission of the act is guilty; but he can not be prosecuted for it.

Mr. LITTLEFIELD. That is it.

Mr. DAVENPORT. Now, I want to know whether we live under a government where such a thing as that can be permitted; whether legislation of that character can run the gauntlet of the Constitution of the United States.

Mr. Low. Is it not within the power of the Constitution to specify the conditions of an amnesty?

Mr. DAVENPORT. We would then run into more constitutional trouble about the pardoning power. Why, Mr. Chairman, our fathers fled from a country that had suffered from the evils of the dispensing power of the king of Great Britain. It was part of the ancient prerogative of the king of Great Britain, it was claimed, in regard to criminal statutes, to remit penalties, both civil and criminal, and the application of that doctrine during the troubles of his reign from 1685 to 1688, when he remitted the criminal penalties against the Catholics, cost James II his crown. That act more than any other, in view of the terrible prejudices that existed in those days, cost King James II his crown. He fled from the country on the landing of the Prince of Orange. But this power of dispensing the penalties of criminal laws was one of the offenses against the rights of man and the rights of the citizen from which our fathers fled to this country in the reigns of James I and Charles I. I suggest that it is contrary to the very spirit of American institutions that anywhere in the Government of the United States, either in its legislative branch, in its judicial branch, or in the executive branch, except as it is under the pardoning power as to past offenses, there should be any such power as this to grant immunity, especially as to future offenses.

Mr. LITTLEFIELD. That is, to relieve the act of its criminal character by an act of the legislature? That is the proposition you are coming to?

Mr. DAVENPORT. I was coming to that. There is a distinguished gentleman here from Chicago who wishes to be heard, and I will now yield to him. I understand that he favors this legislation.

**STATEMENT OF MR. LEVY MAYER, OF CHICAGO, ILL.**

Mr. MAYER. I have no arguments, suggestions, or comments to make, and the reason for that position is this: At a conference held last night and early this morning with Mr. Low and his associates who are primarily responsible for drafting this particular bill, certain proposed amendments were discussed which I am advised it is their contemplation to put into tangible shape. Those proposed amendments with the further amendments which it is contemplated will be taken up, discussed, and put into form, will probably dispose of a number of objections that we have to the pending bill. It has been deemed impolitic that I should at the present time attempt to discuss certain portions of the pending legislation which are by us deemed unfair or unreasonable, because it is believed they will be cured by contemplated amendments, and on that account it is deemed appropriate and preferable that until the contemplated amendments are whipped into shape, any comments or suggestions we desire to make should be suspended, with the hope that possibly there may be no occasion to advance a number of the arguments or points, which otherwise would have been submitted to the committee to-day. There is just one point which I feel justified in submitting to you for your consideration, and which it will be endeavored to cure by an amendment if it is curable, and I allude to it, not that I do not believe that the members of the committee have very much more food for intellectual reflection than they need, but this may furnish a reason why I am suspending comment on the bill. Under the pending proposed legislation the so-called immunity which will be granted to corporations which are registered, will lead to very serious consequences, in view of the fact that the Federal Government does not contemplate in the pending bill—and if it did it could not successfully do so—to grant immunity to corporations whose registration has disclosed possible violations of the antitrust statutes of the 46 different states; and very fearful consequences might ensue to the corporations that might register, and it is our idea that this registration would be all-embracing and all-absorbing because no one corporation could register without showing its contracts, and all other corporations which were parties to those contracts, unless they registered would not gain the benefit of the contemplated registration law, and they, in turn, if they registered, would have to file and submit their contracts which would bring in other parties and corporations, and it is very easily conceivable how, within a very short time, every corporation would be a registered corporation. Otherwise, the corporations that were registered and were parties to a contract would gain certain immunities while those who were parties to the same contracts and did not register would have the possible penalty of the Sherman antitrust act and the amendments against them.

There of course can be no contract unless there are two parties to it, and if any one party registers it must file that contract; so that this would of necessity require the registration of all other corporations interested in the contract. That would lead in turn to the filing with the Bureau of Corporations, or whatever department became the depository of the contracts, of all contracts of corporations, and that would lead to a disclosure which might lead to untold injurious consequences, because these disclosures might indicate—I do not say will indicate—violations of the various antitrust statutes of the

various States, and so far as interstate commerce is concerned the violations disclosed by such contracts would furnish conclusive proof to the various prosecuting departments of the various States of the absolute violation of the local antitrust statutes. That is a prospect which is both appalling in its portents and creates a conundrum which will require all the intellectuality, legal and otherwise, of those who are employed in drafting this legislation to cure it.

Mr. LITTLEFIELD. Do I understand you are opposed to this legislation unless this appalling consequence is provided against?

Mr. MAYER. We are opposed to it in its present form.

Mr. LITTLEFIELD. Have you noticed that it authorizes the President at any time to impose any new and additional regulations he likes?

Mr. MAYER. That has been provided so that no corporation in advance would know what regulations might be made in the future. We contemplate and appreciate the possible consequences, and in view of that, after a long conference last night, continuing until 2 o'clock this morning, it has been deemed best that the views which I was to advance for the various interests I represent should be held in abeyance, because in the very immediate future it is believed that amendments can possibly be formulated and presented which would cure at least some of the objections which at the present time we deem not only serious, but vital to the proposed legislation.

Mr. LITTLEFIELD. I just want to make this suggestion, that it is quite possible that unless you are heard now in detail you may not have an opportunity to be heard later. Of course the session of Congress is drawing to a close, and while I personally am willing to accommodate you to any extent that is thought to be reasonable, yet the people who are interested in the bill want to conclude the hearings within a reasonable time.

Mr. MAYER. The answer to that is this. It is believed that some of the objections to the bill can and will be cured by the amendments of this committee, and that the discussion in public at the present time of these matters would subserve no good purpose, but would lead possibly to a great deal of needless acrimony, and promiscuous hostility which we believe can be avoided. The interests for which I am talking are extremely anxious that some appropriate legislation, reasonable in its scope and terms and beneficial and advantageous in its results, should become a law; but the pending legislation, if it unfortunately does become a law, will work hardships of so untold a character that we hesitate to even imagine what those consequences will be.

Mr. LITTLEFIELD. What interests do you represent?

Mr. MAYER. I am speaking for the Illinois Manufacturers' Association and the American Shippers' Association. The Manufacturers' Association, directly and by alliance, has 6,000 members who represent in the aggregate two billions of dollars.

Mr. LITTLEFIELD. What is your own business?

Mr. MAYER. I am a lawyer.

Mr. LITTLEFIELD. I was going to say that after you get through with your conferences and discussions, if you do not reach any conclusion satisfactory to you, if we can so arrange I would be very glad to hear you; but I am doing my best to forward the hearings, in deference to the wishes of my friend, Mr. Low. Perhaps if you burn



a sufficient amount of midnight oil you may be able to get a result that may be satisfactory to you.

Mr. MAYER. If I may be indulged in the request, I would like the chairman to ask Mr. Low to state his views of what I have spoken of.

Mr. LITTLEFIELD. So far as I am concerned that is agreeable. I want to accommodate Mr. Low.

Mr. Low. At the outset of this hearing I referred to the proposed transfer to the Interstate Commerce Commission, and our general idea that if we could learn to-day the objections to the bill it was quite possible that some of them might be obviated by amendment.

Mr. LITTLEFIELD. I can see the force of these suggestions.

Mr. MAYER. May I be pardoned just one other suggestion, and possibly a legally technical one? In a case in which I was engaged as counsel, in which the antitrust statutes of Illinois were tested as to their constitutionality, the supreme court of Illinois decided, and its decision has been subsequently approvingly cited by the Federal Supreme Court, that the requirement of the Illinois statutes that every corporation shall annually make a statement as to whether it is a party to a contract or agreement or combination in restraint of trade, the State statute granting immunity if the truth be told and inflicting the penalty for perjury if an untruthful affidavit be filed, was valid, and the supreme court of Illinois in our favor said that the disclosure might show a violation of the Sherman Antitrust Act, and that the immunity of Illinois was not coextensive with the offense; but the reply to that was that the State of Illinois and the Federal Government were two independent sovereignties, and decisions were cited from the United Kingdom and its colonies to show that they would have a defense against the penalty under the law of the independent sovereign, and that it was no answer to say that the disclosure might subject them to penalties under the Federal law.

Mr. LITTLEFIELD. It was held in that case that the statute was valid?

Mr. MAYER. Yes, sir; that the statute was valid.

Mr. LITTLEFIELD. So that is a question for the exercise of legislative discretion, as to whether legislation of that sort should be placed on the statute books which subjects a corporation to consequences as to which they can not get proper legal protection?

Mr. MAYER. This goes a little further; it goes not so much to the legislative discretion, but it goes to the fact whether legislation of that character, unless it can be adequately protected, should be contemplated or even projected.

Mr. LITTLEFIELD. That is a question of policy.

Mr. MAYER. Because as to this registration, as the chairman and the other lawyers of the committee know, very few contracts nowadays exist that are not both interstate and intrastate in their scope, and in the employers' liability decision, as you know, the Supreme Court reversed the validity of your statute and held it unconstitutional and illegal because it embraced intrastate commerce, holding in that case that the Congress could not legislate on that subject. No immunity that Congress would undertake to grant, nor any right of pardon given to the President, could possibly, in any most distorted view of the law, cover State offenses.

Mr. LITTLEFIELD. No; you are right.

Mr. STERLING. Wherein would the dire calamity be? Might it not result in some good?

Mr. LITTLEFIELD. That is, should people have immunity from the law?

Mr. STERLING. It might enable the States to enforce their statutes more effectively.

Mr. LITTLEFIELD. Why should not the statutes disclose these unhealthy conditions?

Mr. MAYER. Because the statutes of many of the 46 States are so inconceivably unfair and unreasonable I do not believe Congress should be made the instrumentality of coercing corporations into disclosing transactions and conduct which squares with every sense of right, propriety, and decency, simply because some legislative tornado has resulted in legislation in certain States of a character which runs counter to every sense of decency and justice.

Mr. LITTLEFIELD. Assuming that legislation to be constitutional, then the question would arise whether this legislative body, in the exercise of ordinary comity, is not bound to assume that those legislatures have exercised their proper legislative discretion.

Mr. MAYER. That is an assumption, Mr. Chairman, which the judiciary sometimes indulges in, or perhaps always, but it is a very violent presumption when indulged in by a legislative body.

Mr. LITTLEFIELD. You feel that when we have knowledge of the real facts, it hardly does to create such a fiction?

Mr. MAYER. Yes, sir. I am very much indebted to you gentlemen, and thank Mr. Davenport.

Mr. BLUR. I want to suggest a point to Mr. Mayer before he goes. Under the law establishing the Bureau of Corporations the Commissioner of Corporations has power to gather information in regard to the organization, conduct, and management of the business of any corporation engaged in interstate commerce, and the information so obtained, or as much thereof as the President may direct, shall be made public. That is the act of 1903 establishing the Bureau of Corporations. Is that not really open to the same objection? I throw that out simply as a suggestion.

Mr. MAYER. The answer to that is that no one is compelled to, or has availed of that law, and there is no immunity granted so as to invite any corporation to come under its cover. But this present legislation is an invitation to corporations, in consideration of the immunity and the constitutional limitation which is promised them, to avail themselves of the very beneficial hope, possibly to be realized, that for some of the misdeeds that some of your clients and my clients have committed, misdeeds because the statute has made them so——

Mr. LITTLEFIELD. Not malum in se——

Mr. MAYER. No.

Mr. LITTLEFIELD (continuing). But malum prohibitum.

Mr. MAYER. That is sometimes a cloak for them to come in and take advantage of the proposed law; but if the consequences are going to be what we anticipate we would urge that the Congress try to cover the proposition, and also one or two others which I have alluded to in my talks with Mr. Low and Mr. Perkins, so that those benefits can be secured for corporations that are registering and the serious consequences be avoided to those who will not register.

Mr. LITTLEFIELD. One of the most conspicuous illustrations of the operations of the Bureau of Corporations is the celebrated immunity bath administered in Chicago to the beef trust.

**ARGUMENT OF DANIEL DAVENPORT, ESQ., OF BRIDGEPORT,  
CONN.**

Mr. DAVENPORT. The suspension in order to let Mr. Mayer make his remarks proved very opportune.

Mr. LITTLEFIELD. There seems to be more or less collusion between you and Mr. Mayer.

Mr. DAVENPORT. I have never conferred with him about this matter. If you turn back to the argument made by Mr. Mayer here against the anti-injunction bill, in 1904—

Mr. LITTLEFIELD. This same gentleman?

Mr. DAVENPORT. This same gentleman, Levy Mayer, in opposition to that bill, as it has just now flashed upon me, you will find a very admirable discussion by him against the constitutionality of this proposed legislation as conflicting with this fifth amendment we are now talking about.

But his remarks were very opportune for another reason, for it gives me an opportunity to direct the attention of the distinguished gentlemen who are responsible for the paternity of this bill to another constitutional flaw in their scheme. The information which a party is bound to disclose in order to get the immunities relates not only to interstate commerce, but to intrastate commerce, and most of us who have occasion to consult the decisions of the Supreme Court are familiar with the fact that, as he says, immunity granted by the Federal Government does not extend to offenses against the States, and vice versa; in regard to the action by the States it is well settled by the Supreme Court in the case he referred to, and I think some other cases bearing on the subject. These gentlemen have injected here into this bill a regulation of intrastate commerce. Congress is stepping into the field here and saying to these gentlemen who do an intrastate business as well as an interstate business, "You must disclose this information in order to get the benefit of this act, and at the same time, of course, you can not be protected from the consequences under the State law." I think that provision brings us squarely up against the principle laid down in the employers' liability case, and in the trade-mark cases in the 100 United States Reports, and that we have another constitutional trouble to worry about in this bill from that aspect of it because it covers both interstate and intrastate commerce; but, lest I may be led too far afield, let me return to what I was talking about when I gave way to Mr. Mayer.

It being plain then that arbitrary classes are created here, a distinction of classes where one individual is liable to prosecution and another is not under the same substantive provisions of the law, the question is whether or not such a law as that is forbidden by the fifth amendment to the Constitution. There could be no doubt about it, under the fourteenth amendment so far as a State is concerned, because of the express language of that amendment, and the matter I now want to invite your attention to is whether or not there is not the same prohibition on the action of Congress implied in the words "nor shall any person be deprived of life, liberty, or property, without due process of law," that is contained in the fourteenth amendment against State action, although the fourteenth amendment adds to the language of the fifth amendment the words "nor deny to any person within its jurisdiction the equal protection of the laws."

I suppose that when the fourteenth amendment to the Constitution of the United States was proposed, it was the common understanding of the legal profession and of the courts that under the fifth amendment all Congressional laws had to be equal in their operation. Substantially similar conditions existing, all persons were to come under the same general law, and that you could not make one law for one man and another law for another man when the conditions were substantially the same. That leads to an examination of what the decisions were prior to the adoption of the fourteenth amendment, and also what was thought about it in Congress when that amendment was proposed, and perhaps I might begin by stating what they thought about it in Congress.

The fourteenth amendment appears to have originated in the minds of Thaddeus Stevens and of John A. Bingham, of Ohio. In December, 1865, they both introduced resolutions. I cite this from volume 37 of the Congressional Globe, part 1, page 10, December 5, 1865:

Hon. Thaddeus Stevens introduced a resolution to amend the Constitution, as follows:

"All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."

On the following day, as appears from the same volume, page 14, December 6, 1865, John A. Bingham introduced a joint resolution to amend the Constitution of the United States so as to empower Congress to pass all necessary and proper laws to secure to all persons in every State in the Union equal protection to their rights, life, liberty, and property. Those resolutions were referred to the Committee on the Judiciary of the House, this very committee. At the same session a joint committee on reconstruction was created, and later that committee reported a proposed amendment to the Constitution of the United States which has this particular provision in it in the words in which it now appears in the Constitution. There was absent from it the sentence that says that every person born within the jurisdiction of the United States or naturalized therein shall be a citizen of the United States and of the State where he resides.

Mr. LITTLEFIELD. What committee did that come from, from the Committee on Reconstruction or the Committee on the Judiciary?

Mr. DAVENPORT. The Joint Committee on Reconstruction. You must remember that there was pending at the same time what was known as the "civil rights act," some fragments of which are in the Revised Statutes of the United States to-day, and that was passed to carry out the same idea that was involved in this proposition of these representatives. When the matter came up for discussion, as will appear from volume 37, Congressional Globe, part 3, pages 24 to 59, on the 8th of May, 1866, the civil rights bill having passed and become a law on the 8th of April, 1866, the first section of the fourteenth amendment having been reported by the Committee on Reconstruction as it now stands, although without the first sentence now in it, Hon. Thaddeus Stevens spoke, as follows:

Let us now refer to the provisions of the proposed amendment. The first section prohibits the States from abridging the privileges and immunities of the citizens of the United States, or unlawfully depriving them of life, liberty, or property, or denying to any person within their jurisdiction the equal protection of the laws. I can hardly believe that any person can be found that will not admit that every one of these provisions is just. They are all asserted in some form or other in our declaration

or organic law. But the Constitution limits only the action of Congress and it is not a limitation on the States. This amendment supplies that defect and allows the Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way, and to the same degree whatever law protects the white man shall afford equal protection to the black man.

Mr. LITTLEFIELD. Before you leave that extract, the gist of Stevens's statement apparently is found in the fact that he ties the Declaration of Independence with the organic law, which rather minimizes the effect of his statement.

Mr. DAVENPORT. Hardly, because of a case I will call your attention to, decided by the Supreme Court of the United States, that the Constitution is to be interpreted in the light of the Declaration of Independence, and that the foundation principle of American institutions is the equality of all men before the law.

Mr. LITTLEFIELD. While that all may be, it does not make the Declaration of Independence part of the Constitution.

Mr. DAVENPORT. No, but we are endeavoring to ascertain whether or not the Constitution of the United States is not to receive the same interpretation in the fifth amendment that it does in the fourteenth.

Mr. LITTLEFIELD. Yes, that is it precisely.

Mr. DAVENPORT. And whether the insertion of the words "nor deny to any person within its jurisdiction the equal protection of the laws" adds anything to the fifth amendment in the respects we are speaking of.

Mr. LITTLEFIELD. That is the precise point.

Mr. DAVENPORT. Of course, you may say "Why were those words added? Why was it not made applicable to the Federal laws as well as the States?" because that was the original idea contemplated by both parties, gentlemen, when they introduced the resolution which begat, as you may say, the fourteenth amendment. It was thought that there were possible some acts by the States which discriminated in some form or other, not by laws, but by administrative or perhaps judicial action, and those words were added, not because, so far as affects this question, they were not covered by the words "nor deprive any person of life, liberty, or property, without due process of law," but to make it so that they could not, by any device or contrivance, evade the principle that was embodied in that. I say that an examination so far as we may be permitted to resort to an examination of the debates in Congress, so far as they throw any light upon the question, discloses that the notion was that what is covered by the fourteenth amendment, so far as State action is concerned, is covered by the fifth amendment, so far as Congressional action is concerned.

Mr. LITTLEFIELD. Do you find any specific reference in your examination of debates to that clause providing for the equal protection of the laws, except this that you found in Mr. Stevens's speech?

Mr. DAVENPORT. There was a great deal of it there, but I was struck with this for the purpose I had in mind, because of the decisions to which I am going to call your attention when I get to it.

Mr. LITTLEFIELD. I had that debate selected out, but have not had time to read it yet, and I wanted to see if I could not avail myself of your investigation.

Mr. DAVENPORT. I assure you that I shall run this thing down myself, and I want to call your attention to the fact that those old lawyers, and they were big men, too—there was, of course Fessenden and all the statesmen there of the war period—were fully imbued with the spirit of American institutions and the rights of men and equal treatment before the laws, and the very reason given for putting the restriction on the States and not putting it on the Federal Government was that it was already in the Federal Constitution. What Mr. Stevens was afraid of was this. Congress was about to admit the reconstructed States, one after another they expected to come in again, and Congress was afraid that when after they came in they might take such action as would nullify the action of the civil rights act, which the Congress the month before had passed. In so far as it relates to this subject it is all summed up in what I have read of what Mr. Stevens said. Were they wrong in their construction of the Constitution? Is it or is it not true that, according to the judgment of the judiciary of this country, all that is embraced, so far as relates to this question, in the clause "nor shall any State deny to any person within its jurisdiction the equal protection of the laws," is by the Fifth Amendment equally prohibited to Congress.

I have some cases that I want to call your attention to on that subject. The first I want to call your attention to is one in the State of Tennessee, the opinion in which was delivered by a judge who afterwards occupied a place on the bench of the Supreme Court of the United States, Judge Catron. The case is *Wally's Heirs v. Nancy Kennedy*, reported in 2d Yerger's Reports, page 554. The syllabus is:

Constitutional law—Law of the land—Partial law.

The clause "law of the land" in our Constitution means a general public law, equally binding upon every member of the community under similar circumstances, and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences is unconstitutional and void.

This is what Justice Catron says:

What is the "law of the land?" This court, on two occasions, and upon the most mature consideration has declared the clause "law of the land" means a general public law equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community, and those who made the law, by another; whereas a like general law affecting the whole community equally could not have been passed. (*Vanzant v. Waddel*.) For the most lucid and conclusive exposition of this clause of the Constitution within the knowledge of the writer, he refers to the opinions of Judges Green, Kennedy, and Peck, in the cause of *The Bank v. Cooper's Securities*, at Nashville in 1831.

Mr. LITTLEFIELD. How does the clause of the Constitution read which he is construing?

Mr. DAVENPORT. "Law of the land."

Mr. LITTLEFIELD. Yes; but just read it.

Mr. DAVENPORT. "But by the judgment of his peers or the law or the land."

Mr. LITTLEFIELD. What was the case that was before the court?

Mr. DAVENPORT. It was in regard to a partial law.

Mr. LITTLEFIELD. What is the nature of it?

Mr. DAVENPORT (reading):

The act of 1827, which directed the dismissal of a certain class of suits, growing out of the reservations of land to the heads of Indian families under the treaties of 1817 and 1819 with the Cherokees, upon a certain state of facts being made to appear, is partial, and therefore unconstitutional.

I strongly suspect that the chairman may have been traveling over this road from the questions he propounds.

Now, I want to call your attention to a case in the State of Maine. There are cases to be found in Pennsylvania where the same doctrine is laid down. There is no doubt about it that those old lawyers and judges of the reconstruction times were saturated with the idea that every man in the community, under similar circumstances, was to be under the same law, and it was their great purpose in the fourteenth amendment to bring to bear against State action the same prohibition as they believed existed in the fifth amendment against Congressional action. They had no idea that there was any new principle being applied by them to the States, nor did they suppose they were doing anything more in the fourteenth amendment as to the States than enact what was already embodied in the fifth amendment as to Congress.

Mr. LITTLEFIELD. Your idea is that the extra language used was simply out of extra precaution?

Mr. DAVENPORT. Anybody that stops to think can see that there might have been other ways than passing unequal laws. Of course it was talked over ad nauseam in the debates over the various ways the States got at the colored brother in those days. The laws might have been equal yet unequally enforced.

Mr. LITTLEFIELD. That is, they wanted to put it beyond a peradventure on account of the peculiar conditions existing?

Mr. DAVENPORT. Absolutely.

Mr. LITTLEFIELD. That is your proposition.

Mr. DAVENPORT. Now, I want to call your attention to a case from the State of Maine, where they say they raise good lawyers.

Mr. JENKS. I want to call attention to the fact that all these cases emphasize "under similar circumstances."

Mr. LITTLEFIELD. That does not mean it is to be a case on "p's" and "b's," but it means from a legal standpoint "under similar circumstances."

Mr. DAVENPORT. If the gentleman would concede the proposition for which I am contending, that, perhaps, would obviate the necessity of discussing it, but you know this question is coming up before the Supreme Court of the United States; it is as big as a woodchuck in the new employers' liability act, and you can not escape it.

Mr. LITTLEFIELD. That precise question was raised by the amendment I offered on the floor.

Mr. DAVENPORT. I want to call the committee's attention to the case of the State of Maine v. Doherty.

Mr. LITTLEFIELD. Who draws the opinion?

Mr. DAVENPORT. Judge Dickerson, the opinion concurred in by all the others, Appleton, Chief Justice, and Judges Cutting, Walton, and Danforth. The court said:

The Constitution of the United States, Article XIV, page 1, provides that "no State shall deprive any person of life, liberty, or property, without due process of law;" and the constitution of this State, Article I, page 6, also provides that "the

accused shall not be deprived of his life, liberty, property, or privileges, but by judgment of his peers, or the law of the land." The expressions "due process of law" and "law of the land" have the same meaning. These provisions have their origin in Magna Charta, the keystone of the arch of the British constitution. They were wrested from the king as restraints upon the prerogatives of the crown, and were incorporated into the Constitution of the United States, and the constitution of many of the Federal States, as a safeguard against the encroachment upon these inherent rights of the people by congress of the State legislatures. When applied to proceedings in criminal cases, the expression "due process of law," or "the law of the land," means that no person shall be deprived of life, liberty, property, or privileges, without indictment or presentment by good and lawful men, selected, organized, and qualified, in accordance with some preexisting law, and a trial by a court of justice, according to the regular and established course of judicial proceedings. (Coke, 2 Inst., 46; 2 Kent, Com., 13; Story on Const., 661.)

But what "law" is meant? Is it statute law, or the common law? If it be the former, what protection do these provisions afford the people against legislative usurpation and wrong? The legislature might enact a law, and provide a regular course of judicial proceedings for its administration, the direct effect of which might be to deprive persons of the rights these provisions were intended to protect, if statutory law was intended by these provisions. In that case, the meaning of these constitutional provisions would be that no person should be deprived of any of the rights specified, unless the legislature should pass an act authorizing it; instead of being a restraint upon legislative power, they would thus afford it unlimited scope and license. The framers of the Constitution do not rest under the imputation of having committed any such absurdity.

The "law" intended by the Constitution is the common law that had come down to us from our forefathers, as it existed and was understood and administered when that instrument was framed and adopted. The framers of the Constitution, and the people who adopted it, appreciated the protection afforded to life, liberty, property, and privileges by the common law, and determined to perpetuate that protection by making its benign provisions in this respect the cornerstone principle of the fundamental law.

I want to call your attention to another very interesting case before I read from the decisions of the Supreme Court of the United States, a case to be found in the Sixth Nebraska, 42, the case of *Atchison and Nebraska Railroad Company v. Baty*. The court said:

The terms "due process of law" and "the law of the land"—one or the other of which is found in all constitutions of the States—are said to mean the same thing; and it is quite clear that they are indifferently used in constitutions for the same purpose. They are said to refer to a preexisting rule of conduct, and designed to exclude arbitrary power from every branch of the Government. (*State v. Doherty*, 60 Me., 509; *Norman v. Heist*, 5 W. and S., 171; the *State v. Simons*, 2 Spears, 767). Hence, these terms do not mean merely a legislative enactment; for "if they did, every restriction upon the legislative authority would be at once abrogated."

Then follows Webster's famous definition in the Dartmouth College case.

Now, then, this matter approached very closely a decision in the Supreme Court of the United States, and I refer to the case of *Cotting v. Kansas City Stock Yards Company* (183 U. S., 104), where the court said:

The question thus presented is of profoundest significance. Is it true in this country that one who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines succeeds in building up a large and profitable business becomes thereby a legitimate object of the legislative scalping knife?

Mr. LITTLEFIELD. Who drew that opinion?

Mr. DAVENPORT. Mr. Justice Brewer.

Mr. LITTLEFIELD. "Legislative scalping knife" is good.

Mr. DAVENPORT (reading). The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice



Catron of this court, when in *Vanzant v. Waddel* (2 Yerger, 260, 270), he said:

Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law by another.

After quoting another Kansas case he quotes, on page 109, from *Cooley's Constitutional Limitations* as follows:

Everyone has a right to demand that he be governed by general rules and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow." This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.

Mr. LITTLEFIELD. What was the particular controversy in that case?

Mr. DAVENPORT. They made one law for the corporations and another for the individuals.

Mr. LITTLEFIELD. And was that a Federal statute or a State statute?

Mr. DAVENPORT. No; under a State statute; but the general propositions involved in it are those to which I direct your attention.

Mr. LITTLEFIELD. Yes; but the specific case in point.

Mr. DAVENPORT. You will not find this question decided. If it had been decided, it would not be necessary to discuss it.

Mr. LITTLEFIELD. Very true; but I want you to get into the record the circumstances surrounding this decision, so that the context will show whether or not it was *arguendo* or *obiter*, or whether it was a decision in point.

Mr. DAVENPORT. That is a pretty nice distinction.

Mr. LITTLEFIELD. You are quite familiar with it.

Mr. DAVENPORT. The precise point is, of course, the point decided; but where they resort to a line of argument which leads to a conclusion which is equally applicable to the language in the fifth amendment as to the language in the fourteenth amendment, and they put it upon these broad grounds, it is fair to suppose that they would put the same construction upon that language in the fifth amendment if the case came before them.

Mr. LITTLEFIELD. That is a legitimate argument, but of course that simply illustrates that the language is not necessarily in point, and is perhaps subject to the criticism that it may be *obiter*.

Mr. DAVENPORT. The point decided, of course, was whether their treatment was obnoxious to fundamental principles.

Mr. LITTLEFIELD. Did the court in that case predicate its decision in the end upon that provision of the fourteenth amendment, which provides that no State shall deprive a citizen of the equal protection of the laws, or was it predicated upon the general conditions you have quoted?

Mr. DAVENPORT. Of course, the precise question presented was whether it was forbidden by the fourteenth amendment—that is to say, whether it denied to the person the equal protection.

Mr. LITTLEFIELD. Then, in that case, the court held, construing a State statute, that it was obnoxious to that provision of the fourteenth amendment which provides that no State shall deprive a citizen of the equal protection of the law, but in the discussion of the question they did use the general terms to which you have referred—general, fundamental principles.

Mr. DAVENPORT. And reenforced their conclusion by those citations and by those authorities, Cooley and the rest of them, and by the reasoning.

Mr. LITTLEFIELD. Your proposition is that the general, fundamental reasons upon which they relied in that case are equally applicable to a construction of the fifth amendment?

Mr. DAVENPORT. Certainly; but of course, we can not say that the Supreme Court of the United States has yet decided; we can not yet say what they will decide, but we can conjecture as to what they probably will decide.

Mr. LITTLEFIELD. Your proposition is that upon reason and authority, the proper deduction is that they will hold that the same inhibitions apply under the fifth amendment as now apply under the fourteenth amendment to the action of the States?

Mr. DAVENPORT. Yes; that is the proposition. Now, let us advance to another proposition involved in this legislation.

Mr. LITTLEFIELD. Before you go to that, Mr. Davenport, I want to just call your attention to a case that has been handed to me so that you can examine it and discuss it later if you want to. It seems that Judge Severance, the district judge in the case of *In re Sing Lee*, 54 Federal Reporter, page 334, uses this language, which in a sense, so far as its authority goes, rather contradicts your proposition:

3. In behalf of the respondents it is also said that this statute denies to them the equal protection of the law, and is therefore void, and section 1 of the fourteenth amendment is invoked; but to this it must be answered that the inhibitions of that section are laid upon the action of the several States, and have no reference to legislation by Congress. The amendment does not even compel the State to award a trial by jury;

citing a case in 92 U. S., 90. That is not of very great weight.

Mr. DAVENPORT. That is far from the proposition here. We know that as far back as when the Supreme Court held certain provisions of the civil rights bill unconstitutional—in fact, the *Slaughter House* cases in the 16 Wallace—they said that the provisions of the fourteenth amendment were directed against State action, not the action of individuals. That is the precise point, that it is directed against the action of the States, and that legislation enacted by Congress to carry out the fourteenth amendment could not be, as you might say, of a positive character, but that it must be of a character to nullify the State legislation, providing a remedy, to come up by appeal from the supreme court of the State to the Supreme Court of the United States.

Mr. Low. Before the gentleman leaves that point, may I not ask him to point out again what the significance of this discussion is as it bears on this bill? It is exceedingly interesting and certainly it is good sense, whether it is good constitutional law or not.

Mr. LITTLEFIELD. There is no question about the moral duty that rests on Congress.

Mr. DAVENPORT. How does that apply here? In the first place, it applies to your distinguished collaborator's proposition here to exempt labor unions from the operations of this law. In the second place, it applies to the creation of two classes here doing the same thing, one of which is guilty and liable to punishment and the other is guilty but exempt from punishment.

Mr. LOW. Mr. Chairman, that is just the point. The lay mind does not quite grasp that, because, while it is quite true that people doing the same thing find themselves in different positions in the end, they both have the opportunity to find themselves in the same position.

Mr. LITTLEFIELD. Your answer is that the statute operates on all alike by giving them all the same opportunity, and if they do not avail themselves of it they put themselves in a position where they can not complain of the operation of the statute?

Mr. LOW. Yes. In other words, that the condition in the bill is in the power of the individual to make.

Mr. JENKS. To use the other expression, all of those under similar conditions are treated alike.

Mr. COWAN. I would like to ask a question just at this point, if it would not result, in the operation of the bill we now have before us, that the determination as to whether or not corporations or combinations of persons belong to the one class or the other—that is, those who were subject to the present law and those who would be subject only to the prosecutions for unreasonable restraints—would depend upon the arbitrary ruling of the officer to whom would be referred in each case the particular contract for him to pass on?

Mr. LOW. Mr. Chairman, if the amendment can be put into the form which we spoke of this morning, I think that difficulty would be avoided—that is to say, having it passed upon by the Interstate Commerce Commission, with an appeal to the courts.

Mr. LITTLEFIELD. So your idea would be, then, that the amendment will at last put it to the court to determine whether it is reasonable or not in advance of legislation, should the parties desire to appeal to the court?

Mr. LOW. Precisely, and further than that, Mr. Chairman, is it not now an executive duty in the Department of the Attorney-General to determine who is going to be prosecuted under this Sherman law just as it stands? They pick out one; they might pick out another. They find the evidence against one or another; they have the duty of doing it against everybody, but as a matter of fact, the decision as to who shall be made a victim under the Sherman law as it now stands rests with an executive department. I think, by the amendment which I suggested this morning, we should avoid that difficulty to a very great extent.

Mr. LITTLEFIELD. Your idea is that you would eliminate some of it; you can not eliminate all, because ultimately it must depend on the Department of Justice as to whether they will attack the decisions of the Interstate Commerce Commission. It is subject to the same criticism in that respect, although it is a question for debate as to whether your suggestion increases or minimizes the difficulties.

Mr. LOW. Precisely.

Mr. LITTLEFIELD. Your idea is that it would minimize the difficulties, and the other people contend that you would increase the difficulties.

Before Mr. Davenport leaves that I want to read a little extract from the *Adair* case, so that he will have it in the record in continuity with his thought. After discussing the right of the employer to discharge and the employee to abandon employment, the court said:

In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. These views find support in adjudged cases, some of which are cited in the margin.

Which is in the line of discussion you have been engaged in.

Mr. COWEN. Does not the Supreme Court of the United States hold that the States may enact laws which apply to all of a class provided there is no arbitrary classification?

Mr. DAVENPORT. Certainly. The right of the States to classify people and bring them under laws is recognized by the Supreme Court, but it must be a substantial and natural demarcation and not one that is arbitrary or fanciful.

Mr. LITTLEFIELD. The elements of differentiation must be inherent in the subject-matter?

Mr. DAVENPORT. That is it.

Mr. LITTLEFIELD. And it can not be declared a class by the legislature itself; the legislation must be predicated upon existing actual conditions?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. In which the elements of differentiation are inherent?

Mr. DAVENPORT. Yes, sir.

Mr. LITTLEFIELD. That is the proposition.

Mr. DAVENPORT. Yes; and summed up, "calling the tail of a cow a leg does not make it so," even if it is done by the legislature.

Mr. BLAIR. If the judge will permit me, I think I can add one item of information which is a more direct inference than those he has cited. As I understand, his proposition is that the language of the fifth amendment, which is more restricted than the language of the fourteenth, and which does not guarantee the equal protection of the laws as against the Congress of the United States, nevertheless means the same thing. As I recall from memory, at the end of the opinion in the employers' liability case, just decided, the court takes up that very question, and it says the point has been raised that this employers' liability act is obnoxious to the fifth amendment because it creates classes, and it discusses this very question of classification. They say, "We do not feel that we are called upon to decide this point, because we have already held the law unconstitutional for other grounds as being beyond the interstate power of Congress," and they add, "We do not wish to detract from what we have held in reference to the power of a legislature to classify."

The point I want to bring home is this, that so astute a tribunal as the United States Supreme Court, if it had thought that the question of classification was not within the purview of the fifth amendment, would have said so, and would not have said "We do not care to go into the merits of this question now, because it is not necessary." They would have said, "This point is not good, because the fifth amendment does not cover classification cases."

Mr. LITTLEFIELD. You will find that most all quoted in my minority view.

Mr. COWAN. Mr. Davenport, the fourteenth amendment, while prohibiting States from depriving any person of the equal protection of the laws, in addition to requiring that they shall give due process of law, permitting classification, but requiring that classification shall not be arbitrary, does not give any more power to the States than the fifth amendment does to Congress with respect to the subject of classification, does it?

Mr. DAVENPORT. I suppose not, if I am right in my contention.

Mr. COWAN. I just wanted to get that correct.

Mr. DAVENPORT. Let us advance a little further into this quagmire which the gentleman has invited us to wade through. Does the fifth amendment of the Constitution—

Mr. LITTLEFIELD. The general purport of it does not seem to appeal to you with great force.

Mr. DAVENPORT. I have studied it and read it and every time I take it up I have a new view of it. It is like one of these kaleidoscopes; you turn it around and something new appears, and I must say it is like one of these puzzle pictures, where you try to find something in the picture.

Mr. LITTLEFIELD. Evidently you are not alone in that, because the gentlemen on the other side are grappling with it too.

Mr. DAVENPORT. The fifth amendment certainly, passing by the question we have been discussing as to requiring equal treatment of everybody under the law, in other words, that the same law, under the same circumstances, shall apply to everybody, also prohibits any arbitrary action. Now, as to the duties imposed by this proposed bill upon this most important official of the Government, the Commissioner of Corporations, or upon his unfortunate substitute, as it seems to me, the Interstate Commerce Commission, because everybody knows they are overloaded with work now, to that extent that the interstate-commerce laws are practically of no consequence for want of enforcement. The Commissioner of Corporations, or his proposed substitute, the Interstate Commerce Commission, will have a certain duty to perform under this proposed bill, and the first question that a lawyer propounds to himself is, "What is the nature of that duty? Is it an administrative or an executive duty? Is it a legislative duty, or is it a judicial duty, or are they all three in one?"

It is unnecessary to remind this committee, of course, that by the Constitution of the United States there is a divorcement, as you might say, a separation, between the persons and officers in whom these powers are vested. The Constitution says that "the executive power shall be vested in a President of the United States of America." It says that "the judicial power shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish," and it provides that "the legislative power shall be vested in the Congress of the United States." We start, then, with a radical separation of those powers, and we follow that, of course, with the proposition that the executive power can not be conferred upon the legislature, and the legislative power can not be conferred upon the executive, nor can the judicial power be conferred either upon the executive or upon the legislature. The legislative makes the law, the judicial interprets and applies the law to particular cases, and the executive executes or carries into effect that law. I want to call your attention, that they may go into the record,

to some quotations. One in the matter of *Davies*, 168 N. Y., 101, is as follows:

Free governments consist of three departments each with distinct and independent powers designed to operate as a check upon those of the other two coordinate branches. The legislative department makes the laws, while the executive executes and the judiciary construes and applies them. Each department is confined to its own functions and can neither encroach upon nor be made subordinate to those of another without violating the fundamental principles of a republican form of government. As this is conceded by the counsel upon either side discussion is unnecessary, but the following authorities are cited for the convenience of those who desire to investigate the subject.

Now, I want to call your attention to what is said by the court in the case of *People ex rel Broderick v. Morton*, 156 N. Y., 144, as follows:

Under our Constitution the executive power of the State answers to that of the king and devolves upon the governor during the term for which he is elected. The legislative power is vested in the senate and assembly, which take the place of Parliament, and the judicial power in the courts established in accordance with the provisions of the constitution. The three great branches of government are separate and distinct, but are coequal and coordinate; their powers have been carefully apportioned; one makes the laws, another construes and judges as to the rights of persons to life, liberty, and property thereunder; and the third executes the laws enacted and judgments decreed. While each department, in its sphere, is in a sense independent each operates as a check or restraint upon the other. The acts of legislature have to be presented to the executive for his approval. The courts may then construe the acts and decide their validity under the constitution; and the executive may in criminal cases modify the action of the courts by the interposition of his pardoning power. But in every case in which one department controls, modifies, or influences the action of another, it acts strictly within its own sphere, thus giving no occasion for conflict, and thus preserving the purpose of the original scheme of a division of power among the three coordinate branches of government, each operating as a restraint upon the other, but still in harmony.

The Constitution of the United States makes it the duty of the President of the United States of America to see that the laws are faithfully executed, and he is required to take an oath for that purpose, and when the Congress of the United States declares that a certain act shall be a criminal act, it is the duty of the Executive to enforce that law, to see that it is executed. Can the legislature, having done that, step in and say to the Executive, "You shall not execute that law; you shall not punish for that crime, or see that the machinery is set in motion?" Can it say to the judiciary, when matters are brought before it which, by the law, are crimes, and a prosecution therefor is instituted by the proper authorities, "You shall not proceed to try that case; you shall not proceed to render judgment; your judgment shall not be executed in accordance with the laws of the country?" I say that any bill drawn in this peculiar way, which purposely preserves the substantive provisions of the existing law, which makes the things forbidden crimes, and then says to the Executive, "You shall not prosecute for that violation of those laws," and to the judiciary, "You shall not try the case," if the accused has done a certain collateral thing to get immunity, is a direct invasion of the constitutional prerogatives of the President of the United States and of the judiciary and is unconstitutional and void on that account.

But let us go a little further. You can not delegate these powers; you can not delegate legislative power to an executive official; you can not delegate judicial power to an executive official, neither can

the Congress assume the powers of either of the coordinate branches of the Government.

Mr. LITTLEFIELD. What do you say on that point about the legislation that vests in the Interstate Commerce Commission the power to fix rates?

Mr. DAVENPORT. Now, I hope that I am not going to be invited to travel all over that ground that was traveled over two years ago, when the rate bill was pending, but I will go into it far enough to show the applicability of the question that the honored chairman propounds. What is the power that is given to the Interstate Commerce Commission? Is it a legislative power? If it is, it can not be delegated. Is it an executive or an administrative power? Then, of course, it can be delegated, and the question involved in that discussion, as yet undecided by the Supreme Court of the United States—

Mr. LITTLEFIELD. Have not the supreme courts of various States sustained legislation vesting in commissions the power to fix rates?

Mr. DAVENPORT. But, as Senator Foraker pointed out in the rate bill debates, those decisions were under the peculiar constitutions of the various States. I think the constitutions of the State of Mississippi and the State of Texas provide for that. Senator Bailey and Senator Culberson and the other gentlemen who disagreed with Senator Foraker in his views upon the motive of the power relied upon those cases, and Senator Foraker pointed to the difference between the constitutions of those States which permitted it to be done, and authorized it to be done, and the Constitution of the United States, which vested the legislative power in Congress, he contending that the power to fix a rate in future was a legislative power.

Mr. LITTLEFIELD. Exactly.

Mr. DAVENPORT. And, when there is found a case in some State where the matter has come up before the United States Supreme Court, it has said that it is a question of the construction of the constitution of the State as to where the power to fix a rate is lodged, which rests with the State courts, and, of course, what the State courts say the laws and constitution of the States mean on that subject they do mean for the Supreme Court of the United States.

Mr. LITTLEFIELD. There is not any question, of course, but what the power to fix the rate is a legislative power.

Mr. DAVENPORT. I can not be too sure of that. It depends upon the jurisdiction in which it is exercised.

Mr. LITTLEFIELD. That is just exactly what I wanted to get at. Does not the Interstate Commerce Commission exercise both executive and judicial power, to say nothing about legislative power, and is it competent for a tribunal to exercise those three powers?

Mr. DAVENPORT. When we talk about the exercise of judicial power, when we talk about the exercise of executive power, we must remember that in one sense the legislature exercises what is called "executive power," for instance, in the appointment of officers, subordinate officers. The courts also appoint officers.

Mr. LITTLEFIELD. Yes; but they are only such officers as are appropriate for the discharge of the duties of the court.

Mr. DAVENPORT. Certainly, but those of us who have not forgotten what we read long ago about the border line between these departments, know that what are sometimes called executive powers, legis-

lative powers, and judicial powers, are quite aside from any proposition that would be involved in this matter. It still remains true, broadly and clearly, that determining what shall be the law of a certain thing is a legislative power, and it remains true that that can not be delegated to an executive official. While it is true that every man who has to exercise discretion has to exercise what you might call, in a sense, judicial powers, yet it is not "the judicial power of the United States," which is vested in the courts of the United States, created in the manner provided by the Constitution of the United States.

Now, the proposition that I approach here is, What sort of a function is it that these gentlemen impose upon the Commissioner of Corporations or the Interstate Commerce Commission? Is that an executive function?

Mr. LITTLEFIELD. Or a judicial function?

Mr. DAVENPORT. Or a judicial function, or a legislative function? There are certain contingencies under which a law can be in the alternative, and upon the ascertainment of a particular fact the one rule or the other becomes operative, and the ascertainment of that fact is, in no part, an exercise of the legislative function. We all remember how it was in the celebrated case of *Field and Clark* (143 U. S.), where, under the revenue law—

Mr. LITTLEFIELD. That is where they held, on the ascertainment of existing conditions, certain legal propositions applied.

Mr. DAVENPORT. Yes, and you know there was a division of the court there. The majority held it was the ascertainment of a fact by the Executive that involved no discretion in the case, and for that reason the majority held the law to be constitutional. The minority held that the ascertainment of that fact did involve discretion, and that because it involved discretion it was an act of legislation which was void as being a delegation of the legislative power by Congress to an executive official. It turned altogether on the meaning of these words. I cite *Field and Clark* (143 U. S.). Certain articles were to come in free of duty, and the words involved in the case were "unequal," and "unreasonable," and the court held that the ascertainment of the matter could be made by the President without the exercise of any discretion, and for that reason they said it was not a delegation of legislative authority. On the other hand, the dissenting judges said, Mr. Justice Lamar—

Mr. LITTLEFIELD. What was that, a bare majority?

Mr. DAVENPORT. No; they all concurred in the result, but Mr. Justice Lamar and Mr. Chief Justice Fuller dissented on this proposition:

We think that the section in question does delegate legislative power to the executive department, and also commits to that department matters belonging to the treaty-making power.

There was no difference of opinion between the majority and minority that a legislative power could not be delegated to the President of the United States; there was no dispute about that.

Mr. LITTLEFIELD. There is no difference of opinion in the authorities on that proposition. The only question is whether in the particular case, it is or not a delegation. That is your precise point here.

Mr. DAVENPORT. Now we come to that point. Equally so there would not be any doubt, would there, that you could not vest in an



executive official, an officer of the executive department, the judicial power of the United States, the power to determine the law of a case and make it operative?

Mr. LITTLEFIELD. Judicial power involves hearing and determination.

Mr. DAVENPORT. That is mere process, but the judicial power is the voice of the American people speaking through a certain tribunal, to ascertain and declare what the law is, and it is brought to bear, of course, only in cases between parties.

Mr. LITTLEFIELD. The judicial power is the determination of a court; does that not state it?

Mr. DAVENPORT. It does.

Mr. LITTLEFIELD. My friend hands me Justice Miller's definition, which I think is substantially the same thing:

It is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who come before it for decision.

That is substantially what you said.

Mr. DAVENPORT. But the kernel of the problem, the essence of the thing, is that there is vested in one department of the Government the power of ascertaining what the law is, and declaring that law, and of course it comes into operation only in controversies between parties and is operative only in that particular case, although it is a precedent for other cases; that is the essence of the judicial power. The proposition, I suppose, will not be disputed by anybody that what is properly called the judicial power of the United States can not be vested in any other than a court of the United States. I will not pause to comment on those cases where the question came up, for instance, United States and Canter, away back there, from Florida, where it was a Territorial court.

Mr. LITTLEFIELD. That is a distinction between constitutional courts and Territorial courts.

Mr. DAVENPORT. Entirely so; nor as to the District of Columbia. There is a good deal to be said about this bill on account of its omissions in regard to the District of Columbia and the Territories, but I say that merely in passing; if we ever get to a discussion of the proposed bill, not a tentative proposition which somebody is thinking about bringing in, but a concrete proposition which the Congress of the United States is asked to pass, we may discuss those propositions, for I do not understand that these gentlemen ask this committee, after having heard all this discussion, to go off on a tangent themselves and get up some bill that they think might meet the conditions.

Mr. LITTLEFIELD. I do not understand that they object to our doing that if we want to, but I do not understand that they insist that we must. I suppose that Mr. Low would not object to the committee taking the burden of grinding this out, but he does not insist that we have to. Do I state that correctly?

Mr. Low. That is right.

Mr. DAVENPORT. I want to take up the proposition, what kind of a function is it?

Mr. JENKS. May I ask the Judge just what specific part of this bill he is referring to?

Mr. LITTLEFIELD. You mean in relation to this question of the distribution of power?

Mr. JENKS. Yes, because if I remember rightly, last week that was one point on which I was kept under fire for about two hours, and I should like to know what part of the bill it is, because I have some decisions of the Supreme Court of the United States in my hand which seem to uphold the provision here.

Mr. DAVENPORT. I am speaking about the provisions under sections 10 and 11.

Mr. JENKS. You are not referring to the provision under section 8 that has to do with the fact that from the commissioner of corporations there may be an appeal, if you please, to the supreme court of the District of Columbia, to decide whether or not he could cancel?

Mr. DAVENPORT. Yankee-like, I would like to ask a question, which I must confess, from an examination of this bill, I am unable to answer myself. Are the provisions of section 2 of the act, being pages 7, 8, and 9, the privileges and immunities which are covered? In other words, if one of these gentlemen gets on the roll, is he to be entitled to the benefits of what is to be found on pages 7, 8, and 9, and if he does not get on the roll, is he not to be entitled to what is found on those pages?

Mr. JENKS. My judgment of the matter is exactly as it states here, that the immunities that are referred to near the top of page 4 are those provided in sections 2, 3, and 4, with the exception of those provided under sections 10 and 11.

Mr. DAVENPORT. I suspected that possibly might be the construction. Then the Sherman antitrust act remains absolutely unchanged as to everybody who does not register.

Mr. LITTLEFIELD. Who does not register?

Mr. DAVENPORT. Yes, does not get on the roll. That is very peculiarly worded here. The doctors disagree; the authors of the bill disagree. I confess my inability to interpret this bill.

And such corporations and associations while registered hereunder, and the members thereof, shall be entitled to all the benefits and immunities given by this act excepting such as are given by section 10 and section 11, without filing such contracts or agreements.

In other words, in order to have any part of this bill operative for the benefit of anybody, or affecting the existing law, the corporation or association must have been enrolled.

Mr. LITTLEFIELD. If I understand the proponents rightly the benefits and immunities that are granted to the labor organizations, because that is what it amounts to irrespective of enrolling, are to repeal the civil damage proposition, and then to provide that all contracts and accommodations heretofore made shall not be prosecuted.

Mr. DAVENPORT. They now say it does not apply to them; they do not get the benefit under that act of the provisions on the last three pages.

Mr. LITTLEFIELD. I did not understand Mr. Jenks that way.

Mr. DAVENPORT. You understand Mr. Low?

Mr. LITTLEFIELD. I understood Mr. Jenks to take the ground that organizations of that character—that is, practically, labor organizations—got the benefit of the provisions of section 3 and section 4, even though they did not register.

Mr. Low. No; I think everybody gets the benefits of section 2 and section 3.

Mr. LITTLEFIELD. Everybody gets the benefit of sections 2, 3, and 4?

Mr. Low. But as to section 4, the benefit is only given to those who register.

Mr. DAVENPORT. What, then, is meant by this:

That such corporations and associations while registered hereunder, and the members thereof, shall be entitled to all the benefits and immunities given by this act excepting such as are given by section 10 and section 11.

What does that mean? What are those other sections, than 10 and 11—what immunities do you refer to?

Mr. Low. I refer to the immunities of section 4, as I understand it; section 2 amends section 7 of that act for everybody.

Mr. LITTLEFIELD. I suppose you could take that part of section 9 and make it a little more lucid—or I might say pellucid. There will be no difficulty in providing in terms just exactly what they propose to exempt them from.

Mr. DAVENPORT. Certainly; if we can understand what it is, but how can we talk about what it is unless we are informed? That is only one of the multitude of difficulties that anybody who undertakes to wade through this act gets into, and I want to inquire right now whether the scheme that lay in the minds of these gentlemen is to let nobody get any benefits from this act whatever unless he registers?

Mr. Low. I understand that section 2, which amends section 7 of the Sherman act, applies to everybody, whether they register or not. It is an amendment to section 7 of the Sherman act.

Mr. DAVENPORT. You would not consider the amelioration of the damages a privilege or immunity under that at all, nor the exception of these people from the operation of the law as a privilege and immunity?

Mr. Low. I do not consider the amendment of the second section is limited by registering at all; that is a change in the law itself.

Mr. LITTLEFIELD. That is, your idea is that section 2 stands alone by itself, so far as its application is concerned?

Mr. Low. I think section 2 is a definite amendment of the law, and is unaffected by the scheme of registration at all; and I think section 3 is in the same position, too, and I do not think that is affected in any way by registration.

Mr. LITTLEFIELD. In other words, they could well become a law by themselves without being affected by the balance of the bill?

Mr. Low. Yes; and affect everybody. Section 4, on the other hand, I understand to be distinctly one of the immunities of the bill.

Mr. LITTLEFIELD. Section 2 and section 3 could be segregated entirely from the bill and without being affected either way.

Mr. DAVENPORT. Anything is possible.

Mr. LITTLEFIELD. That gives you their idea.

(Thereupon, at 5.10 o'clock p. m., the subcommittee adjourned until Saturday, April 18, 1908, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY,  
HOUSE OF REPRESENTATIVES,  
*Saturday, April 18, 1908.*

The subcommittee met at 10.25 o'clock a. m., Hon. Charles E. Littlefield (chairman) presiding.

**ARGUMENT OF MR. DANIEL DAVENPORT—Continued.**

Mr. DAVENPORT. Before I forget it, I want to say that besides representing the American Anti-Boycott Association, I have been requested to represent here and to voice the opposition to this bill of the following organizations: The Masons' and Contractors' Association of Chicago, the Architectural Iron League, the Chicago Master Plumbers' Association, the Chicago Master Steam Fitters' Association, the Chicago Cut Stone Contractors' Association, the Building Contractors' Association, the Sheet Metal Contractors' Association, and the Mantel and Tile Dealers' Association.

When the committee rose night before last, I had reached, in the pursuit of the several will-o'-the-wisps and miasms that hover over this legal quagmire, the point of inquiring what was the quality or the nature of the power, viewed in its constitutional aspect, which this bill vests in the Commissioner of Corporations, or the Interstate Commerce Commission; whether it was legislative, executive, or judicial, or whether it was all three, or two of the three, and which two of the three. Before exploring that subject, however, let me say that I have had in mind the suggestion of the chairman that I look a little into the history of the debates in Congress with reference to the fourteenth amendment prior to its adoption.

Mr. LITTLEFIELD. On the proposition of the equal protection of the law?

Mr. DAVENPORT. Yes; to see whether there was any further light to be gleaned from those sources. I made as careful an examination of them as the time would permit, and I found that when the matter came up in the Senate, Senator Howard, who was one of the joint committee on reconstruction and seemed to be in charge of the matter, spoke as follows, on May 23, 1866. This is to be found in volume 37, part 3, page 2766, of the Congressional Globe. He said:

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. \* \* \* It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States and to all persons who happen to be within their jurisdiction. It establishes equality before the law, and gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That is Republican Government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no Republican Government, and none that is really worth maintaining.

And again, on June 5, 1866 (37 Cong. Globe, part 4, p. 2961), he said:

It seems to me that there can be no valid or reasonable objection to the residue of the first proposed amendment "nor shall any State deprive any person of life, liberty,

or property without due process of law, nor deny to any person the equal protection of the law.”

It is the very spirit and inspiration of our system of Government, the absolute foundation upon which it is established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this, we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all partial State legislation in the passage of what is called the civil-rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt be left existing as to the power of Congress to enforce principles lying at the very foundation of all Republican Government, and I can not doubt but that every Senator will rejoice in aiding to remove all doubt upon the power of Congress.

Mr. LITTLEFIELD. Does that exhaust your investigations of the debates?

Mr. DAVENPORT. I was about to say that apparently the views of Thaddeus Stevens in the House of Representatives and the views of Senator Howard in the Senate on this subject were acquiesced in by all, for I can find no further reference to the subject.

Mr. LITTLEFIELD. The legislative history, then, is such as not to disclose any specific discussion of the particular question that you had in mind?

Mr. DAVENPORT. No, further than the manifest opinion on the part of the Senators and Representatives that the principle that was embodied in the fourteenth amendment relative to this matter was already in the fifth amendment to the Constitution and other clauses of the Constitution; that it was nothing new. That the fourteenth amendment did not create any further limitations upon State action than those that already existed upon the Federal Government in the fifth amendment and other cognate clauses.

Mr. LITTLEFIELD. Does it not state it a little more accurately to say that the debates indicated a consensus of opinion upon the part of the men who had the responsibilities of legislation at that time, that the amendment proposed was in entire harmony with the fundamental principles of the national law?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. Or, rather, that is the trend of the discussion?

Mr. DAVENPORT. Not only that, but that they were already in the fundamental law so far as it related to the Federal Government.

Mr. LITTLEFIELD. Perhaps it proceeded upon the assumption in the Federal law that those rights ought to be protected and guaranteed.

Mr. DAVENPORT. In the case of *Duncan v. Missouri* (152 U. S., 382), the court said:

Due process of law and the equal protection of the laws are secured if the laws operate on all alike and do not subject the individual to the arbitrary exercise of the powers of the Government.

Mr. LITTLEFIELD. What were they discussing there, a State statute?

Mr. DAVENPORT. A State statute, of course. The question there was whether a change in the court procedure in Missouri in criminal cases was in conflict with the prohibitions of the fourteenth amendment.

Mr. LITTLEFIELD. It apparently being the establishing of an arbitrary rule for a particular classification, if I remember the case right.

Mr. DAVENPORT. No; they provided that the supreme court of Missouri should consist of two bodies and that one should have charge of criminal matters and the other should have charge of civil matters, and that in certain cases both courts might be brought together as one court. The point is that Chief Justice Fuller in that opinion couples the two clauses together and says that "due process of law" and "the equal protection of the laws" are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of Government.

Mr. LITTLEFIELD. I would say by way of suggestion that when you come to revise your remarks you can take all these authorities and group them with the others, so that all on that topic will be together, for convenience of reference.

Mr. DAVENPORT. In the case of *Cotting v. The Kansas City Stock Yards Co.* (183 U. S., 107), Mr. Justice Brewer, speaking for the court, quotes as follows from the case of the Gulf, Colorado and Santa Fe Railway Co. v. Ellis (165 U. S., 159), in which was presented solely the question of classification under the fourteenth amendment. In that case he said, referring to many cases, both State and national:

But arbitrary selection can never be justified by calling it classification.

I assume that I have sufficiently adduced authority and reason in support of the proposition that the same inhibition against class legislation exists against Congressional action by virtue of the provisions of the fifth amendment, as exists against similar State action by virtue of the provisions of the fourteenth amendment, and I pass to a more detailed application of that in view of the peculiar scheme which is proposed here.

Mr. LITTLEFIELD. This expression that you now cite is a declaration on the part of the court that the determination of the legislature that certain facts exist, without the existence of the facts—that is what it comes down to—is not conclusive on the court?

Mr. DAVENPORT. Yes, and not only that, but as illustrative of the interpretation by the Supreme Court of such provisions. The chairman very properly pointed out the language in Thaddeus Stevens's remarks, saying this is "either in the Declaration of Independence or in the organic law."

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. As though the provisions of the Declaration of Independence on the subject of the equality of man before the law were not imported into the Constitution, necessarily. I want to direct the attention of the committee to what is said here in this case, and I will read this again:

But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins* (118 U. S., 356, 369): "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

And I would call the attention of the committee to the fact that this is followed in the Declaration of Independence by the statement "that to secure these ends governments are instituted among men."

Mr. LITTLEFIELD. Is not the historical accuracy of the distinguished justice a trifle off there, when he says that the first official action of this nation declared the foundation of government in those words?

Mr. DAVENPORT. No.

Mr. LITTLEFIELD. We had not any nation until the Constitution of 1787. It was the Declaration of Independence which inaugurated the effort to create the nation. Is not the distinguished justice just a trifle off in his historical allusion?

Mr. DAVENPORT. If the chairman will revert to an early case, the name of which I forget now, decided by Chief Justice Jay, he will see that he very clearly establishes that the birth of this nation and the beginning of its existence as a nation was not on the adoption of the Constitution in the year 1787 and 1788, but that it was a nation from 1776 down to the time when the Constitution was adopted. It was contended for, maintained, and declared, and supported by the most powerful reasoning of Chief Justice Jay. We make a great mistake, those of us who were not trained in the Southern States rights school, when we assume that the first official act of this nation was the adoption of the Constitution in 1787. The first official act of this nation was the Declaration of Independence in 1776, of course made good by the arms and efforts and sacrifices throughout the colonies in maintaining it; and I think that the distinguished jurist was not off.

Mr. LITTLEFIELD. I should agree that it was the first step made in the progress toward becoming a nation, but how from an intelligent legal standpoint that in itself could be held to be an act of a nation which up to that time had not been created and was not in existence, I do not see.

Mr. DAVENPORT. Perhaps it was *nunc pro tunc*.

Mr. LITTLEFIELD. That helps it out

Mr. DAVENPORT. The court says:

The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness." While such declarations of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

This whole case of *Cotting v. The Kansas City Stock Yards Company* is very illuminating upon the subject, which, by and by, we hope to approach in the discussion of this bill, as to this absurd, if we may so call it, unnatural, and artificial classification which is attempted to be made in it.

Mr. LITTLEFIELD. The State statute in that case made the discrimination, did it?

Mr. DAVENPORT. Aimed at the corporation.

Mr. LITTLEFIELD. And the court declined to sustain it?

Mr. DAVENPORT. Just as this bill aims at persons and corporations.

Mr. LITTLEFIELD. The court declined to sustain that statute?

Mr. DAVENPORT. Yes; it held it to be bad. Perhaps I had better return now to the inquiry as to what is the nature of the power that this most important official is to exercise.

Mr. LITTLEFIELD. That is, when the Interstate Commerce Commission, which it is now proposed to vest with this power, undertake to determine that the contract submitted to them is in unreasonable restraint of trade, the question is whether that act on their part is a legislative, executive, or judicial act; that is your proposition, is it?

Mr. DAVENPORT. I was about to give some thought along that line.

Mr. Low. May I simply say here that while my own preference is to give this matter entirely to the Interstate Commerce Commission, I find that by reason of the functions at the present time existing on the part of the Bureau of Corporations and on the part of the Interstate Commerce Commission, it would have been more convenient to give the first step to the Bureau of Corporations and the Commissioner and provide for an appeal from his action to the Interstate Commerce Commission and from that to the court?

Mr. LITTLEFIELD. You have introduced another factor into the machinery, then?

Mr. Low. Yes.

Mr. LITTLEFIELD. It is entirely immaterial, so far as this discussion goes, why you did it.

Mr. DAVENPORT. Entirely immaterial.

Mr. LITTLEFIELD. Is it now suggested that instead of changing the bill so as to have the contract filed in the Interstate Commerce Commission, it should still be filed with the Bureau of Corporations, and there should be an appeal from the Bureau of Corporations to the Interstate Commerce Commission?

Mr. Low. Precisely.

Mr. LITTLEFIELD. And from the Interstate Commerce Commission to the courts?

Mr. Low. Yes.

Mr. LITTLEFIELD. That simply intensifies the necessity of finding out what kind of power it is.

Mr. EMERY. Is there an amendment drawn to that effect before the committee?

Mr. LITTLEFIELD. Not formally, I take it.

Mr. DAVENPORT. I understand it exists in a nebulous form.

Mr. LITTLEFIELD. It is sufficiently concrete for discussion. It is not necessary to submit it in writing. The proposition now is that instead of changing from the Bureau of Corporations to the Interstate Commerce Commission the power will still be left in the Bureau of Corporations in the first instance; and then an appeal shall be provided, in appropriate language, from the Bureau of Corporations to the Interstate Commerce Commission; and another appeal in turn to the court. That brings you right plumb down to the proposition as to the character of the power that is to be exercised by the Bureau of Corporations under the provisions of this bill. Do I state that right?

Mr. Low. Yes, Mr. Chairman; and an appeal is given to the United States from the Bureau of Corporations and from the Interstate Commerce Commission in case of inaction.

Mr. LITTLEFIELD. That, of course, is another feature. Up to date the bill provides only for an appeal on the part of a corporation that feels it has not received proper treatment, but the proposition now is to provide for an appeal for the United States. Of course, we will find out the details when they are submitted later. There is



to be an appeal on the part of the United States or upon the part of the corporation aggrieved. That is, if the United States is aggrieved by the failure of the commissioner to act or in case the party is aggrieved by the decision of the Commissioner of Corporations. In either case the party aggrieved has an appeal to the Interstate Commerce Commission, and if not satisfied with the decision of the Interstate Commerce Commission to some court. Perhaps that clarifies matters and gives you the situation better.

Mr. DAVENPORT. We have got to have some ground to stand on before we can argue about this bill.

Mr. LITTLEFIELD. I think the situation is now clear, and it emphasizes the necessity of ascertaining the nature of power to be exercised.

Mr. DAVENPORT. That is true. Is it the contention of Mr. Low that all parties shall be enrolled and come within the favored class, to be proceeded with in the manner he has last indicated, or is there discretion vested somewhere as to the enrollment?

Mr. Low. There is no discretion anywhere in the bill as to an enrollment. That follows as a matter of course.

Mr. LITTLEFIELD. Anybody can file an application.

Mr. Low. Anybody can file an application and be enrolled.

Mr. LITTLEFIELD. The enrollment is of course, and anybody can file an application for enrollment.

Mr. Low. Precisely, and they can not be stricken off the roll arbitrarily. Everybody can get on, and nobody can be stricken off arbitrarily.

Mr. LITTLEFIELD. I think, as soon as you may be able, and according to your own convenience and facility in working out your own ideas, while this general proposition can be discussed equally well without having matters formulated, I think it would be well to have you get in concrete shape the idea you have in relation to the appeal and the method in which the various aggrieved parties can protect their rights. The general proposition can be discussed without that, but the details are an interesting feature to be worked out.

Mr. DAVENPORT. If I may be allowed to ask Mr. Low, is the enrollment of the corporation or person to be favored to be made by the Commissioner of Corporations?

Mr. Low. The bill has not been changed in that respect.

Mr. DAVENPORT. The manner of enrollment and everything that may be involved as a prerequisite to enrollment is to be passed upon by the Commissioner of Corporations, and that is final?

Mr. Low. No; there is no opportunity for discrimination by the Commissioner at all, and there never has been, and there is doubtless an appeal to the court if anyone is aggrieved. Our intention in regard to the act is to make it impossible to deny anybody enrollment or to remove anybody from the registration.

Mr. LITTLEFIELD. If I get your idea, the fact of the enrollment does not confer any right at all, except it is a preliminary step toward enabling people to avail themselves of the immunities provided by the act, and whether they get the immunities depends upon the enrollment and whether they give the information required; and whether they get the determination, that provides them with the immunity, from the Commissioner of Corporations.

Mr. Low. No; they can not be enrolled unless they comply with the conditions in the law as to information.

Mr. LITTLEFIELD. Then the enrollment is not a matter of course, but they must comply with the conditions of the act before they can be enrolled?

Mr. Low. Before they can be enrolled.

Mr. LITTLEFIELD. The enrollment is conditional upon that?

Mr. Low. Enrollment is conditional upon that. But having given that information, having complied with the conditions, their being enrolled does not depend on the Commissioner of Corporations or anybody else.

Mr. LITTLEFIELD. It depends on the President, of course; and when the President makes the regulations, there will be simply fixed, arbitrary conditions.

Mr. Low. Precisely.

Mr. LITTLEFIELD. Entirely removed from the discretion of the Commissioner of Corporations or anybody else, upon a compliance with which anybody can be enrolled, and without a compliance with which nobody can be enrolled.

Mr. Low. That is it, precisely.

Mr. LITTLEFIELD. So that the matter of enrollment is to be an arbitrary, fixed, definite proposition, fixed by the law, entirely apart from anybody's discretion. Then what happens afterwards? Being enrolled, they are entitled to all the privileges and immunities given by that act, and the question of future contracts or future combinations is dealt with upon the basis which I have just described, that is to say, they may or may not be submitted to the Bureau of Corporations, but are passed upon in the first place by the Commissioner, with appeal to either party aggrieved, as you expressed it a moment ago.

Mr. EMERY. Is the word "enrollment" used as synonymous with the term "registration," in the bill?

Mr. Low. Yes; I presume so. It was not my word.

Mr. DAVENPORT. If I gather the proposition as it is now announced by Mr. Low, it is that the Commissioner of Corporations is to decide upon that subject of whether or not the party has complied with the conditions which entitle him to enrollment, and he has, back in the background, some idea that if the Commissioner says "Why, you have not complied with those conditions," somewhere in the system of the United States some power may be found to compel a registry of the party; but that there is to be no appeal from the Commissioner to the Interstate Commerce Commission and from the Interstate Commerce Commission to the courts on the right to register. That is not contemplated by the scheme.

In the matter of cancellation of the enrollment, which is taking one out from under the registration, and so forth, the Commissioner of Corporations, with the approval of the Secretary of Commerce and Labor, is to decide; but from that an appeal is to lie, or some proceeding for review, to the supreme court of the District of Columbia.

Mr. LITTLEFIELD. Through the intermediary of the Interstate Commerce Commission.

Mr. DAVENPORT. Is that right?

Mr. Low. Through the cancellation of the registration there is an appeal from the Commissioner.

Mr. LITTLEFIELD. I do not know what you propose by your proposed amendment. Do you contemplate having all the appeals from

your Commissioner of Corporations on cancellation of registration go through the channel of the Interstate Commerce Commission?

Mr. Low. Not at all.

Mr. LITTLEFIELD. They would go right straight to the supreme court of the District of Columbia?

Mr. Low. Yes.

Mr. LITTLEFIELD. But in other matters you would go through the Interstate Commerce Commission?

Mr. Low. Yes; that relates simply to future contracts.

Mr. DAVENPORT. I think we may assume that that is the programme. That has not yet been changed.

Mr. LITTLEFIELD. But as to which they have the right to change.

Mr. DAVENPORT. I believe we can not deny to them the privilege of a lady, even, to change their minds; but when we come to contracts after parties get on this roll, from the action of the body, which ever it is finally decided to be, either the Commissioner of Corporations or the Interstate Commerce Commission, or both, or one after the other, an appeal is to lie as to the action of the Commissioner either one way or the other on the question of the reasonableness of the contract or arrangement that is proposed. It that it?

Mr. Low. From the Commissioner to the Interstate Commerce Commission.

Mr. DAVENPORT. And from the Interstate Commerce Commission to the court.

Mr. Low. No; I do not understand there is any appeal upon the part of the United States from the action of the Interstate Commerce Commission.

Mr. DAVENPORT. I do not say to injured parties, but if they decide, the way they view this arrangement, that it is in unreasonable restraint of trade, and therefore they notify the party that they condemn the arrangement—

Mr. LITTLEFIELD. Those matters are matters largely of detail. They do not affect your substantive proposition.

Mr. DAVENPORT. Still, Mr. Chairman—

Mr. LITTLEFIELD. I was going to say, if they did not, you could leave those matters until you get the amendments to criticise.

Mr. DAVENPORT. But in order to get something here, to get somewhere in this discussion, we must know a little of what the scheme is.

Mr. LITTLEFIELD. Do I understand you think it is too nebulous for you to get a concrete proposition for discussion?

Mr. DAVENPORT. If the chairman will bear with me a moment, I will explain to him the thing that lies in my mind. I want to know whether, if the Commissioner decides that the contract is reasonable, there is to be an appeal from that decision. If, on the other hand, he decides that it is unreasonable, is there to be an appeal from that decision, according to the programme?

Mr. LITTLEFIELD. They have already stated that there is, in both instances, except that he is not given any power to declare it reasonable or unreasonable.

Mr. DAVENPORT. He is given a power to issue an order that it is unreasonable; and if he does not do that, the other alternative comes into action.

Mr. LITTLEFIELD. That follows, as a matter of detail.

Mr. LOW. Mr. Davenport's question was whether in the event of an adverse decision, the Government is to have a right of appeal.

Mr. DAVENPORT. Is the Government to be a party here?

Mr. LITTLEFIELD. That remains as it is worked out.

Mr. DAVENPORT. I am thinking of the victim, of the gentleman who has gone forward and made a contract which subjects him to the action of the Commissioner, and the Commissioner says it is not a reasonable contract. I understand he contemplates that there shall be an appeal from that decision to the Interstate Commerce Commission, not to the court.

Mr. LOW. After the Interstate Commerce Commission rules there is to be an appeal to the court.

Mr. DAVENPORT. So that you have two appeals?

Mr. LOW. Yes.

Mr. DAVENPORT. In case he says it is not in unreasonable restraint of trade, and people think it is who are going to be affected by it adversely, is an appeal to be allowed by those people to the Interstate Commerce Commission and afterwards to the court, or not?

Mr. LITTLEFIELD. Mr. Davenport's proposition is that the United States may perhaps be satisfied with the determination, but that the people of the country who may be interested in the carrying out of this proposition, may feel that the determination of the Commissioner is improper and that the restraint, as a matter of fact, is unreasonable, and he wants to know whether they are going to have a chance to have their rights protected by an appeal. That is it, is it not?

Mr. DAVENPORT. Why, yes; I want to get at this.

Mr. LITTLEFIELD. For instance, competitors in trade, or consumers?

Mr. DAVENPORT. Yes; people that are badly affected by a combination holding up the price, who feel that in order to carry on their business successfully they must have a decrease in that price.

Mr. LITTLEFIELD. All this contention has no tendency whatever to affect the power vested in this Commissioner. Whether that is legislative, executive, or judicial power I imagine is an important point in your mind as determining even the right of appeal, and it seems to me that the machinery, the *modus operandi*, has very little to do with the quality of that power.

Mr. DAVENPORT. I would defer, of course, to the judgment of the chairman, but it would seem to me, with my untutored mind, that an action by a commissioner, and so forth, which permitted an appeal on one side and did not permit an appeal on the other side, might be arbitrary within the definitions and decisions of the court, and I think that the gentlemen, having thought about this thing so long and so profoundly, should at least vouchsafe us the information whether they intend that the action of the body, whatever body it is, that is to pass upon this matter, is to stand where they say that in their judgment it is all right, and you can go ahead.

Mr. LOW. This bill has never undertaken to deal with anything but the action of the United States under these contracts. It does not interfere in any way with the relation of private parties to the matter.

Mr. LITTLEFIELD. Then they do not propose to provide for anybody else but the United States Government?

Mr. DAVENPORT. Then I think we have prosecuted that inquiry as far as we are at present likely to get any light on it.

Mr. LITTLEFIELD. Yes; I guess you have gotten to the bottom of that pond.

Mr. DAVENPORT. Now, what is the nature of the power which is conferred upon this tribunal, whatever it is? Is it executive; is it legislative; is it judicial; or is it a mixture of all or of two of them or which of the two? This making of statutes, of course, is a very practical matter. You have got to bring down with precision the mind of the legislature and embody it in the statute so that the courts may construe the statute so as to arrive at their estimate or conclusion as to what the legislature meant. The best way to test the matter is to consider now a concrete case, and inasmuch as the public has now before it a concrete case, let us take that. We may suppose that, the law having been adopted as is proposed here, that very case will be presented to the commission—to the commissioner or to the commission, or whoever the tribunal may be—to pass upon. Of course the committee understands that I am objecting to this proposed bill because it destroys the Sherman antitrust act, so far as the particular interests I represent are concerned, in two ways. The first provisions of the proposed bill which relate to this enrollment business and the action thereafter to be had only against combinations in unreasonable restraint of trade; and the sections amending the 7th section and what is thereafter in section 2 in the proposed bill; either of these ways would knock the Sherman antitrust act, I believe, into a cocked hat, figuratively speaking, from a legal standpoint, so far as these interests are concerned which I am specially here to protect. If you knock that law out by inserting the first provisions there, it is of no value for the protection of anybody, and as illustrating this I want to read a statement of the condition in the steel industry that is disclosed to-day, as it is set forth in an extract from The Evening Sun of April 9, 1908. This reads as follows:

Steel prices to stay. No change contemplated, says Judge Gary. E. H. Gary, chairman of the United States Steel Corporation, gave out an interview to-day denying published reports that a reduction in the prices of steel commodities was contemplated. "From all the information at hand," he said, "I do not hesitate to say that no reductions in the prevailing prices of steel are contemplated. Certainly that is our position. Of course, prices may be increased or decreased at any time if there is good reason. I do not think such a thing is possible, however, without due consideration or without previous information being given to all concerned, including customers. If any good reason can be given for changing the price of any commodity the question will be promptly considered on its merits."

Bear in mind this is not the Government that is speaking thus autocratically. This is the voice of the head of a corporation which very likely would have occasion to present this very subject to this official; and then I want to have you consider for a while the power that this commissioner is going to exercise in dealing with the problem.

Mr. LITTLEFIELD. Are these products that Mr. Carnegie spoke of in his letter some of the products that would be under the consideration of the tribunal?

Mr. DAVENPORT. I do not know about that.

Mr. Low. I think it is fair to call attention to the fact, as Mr. Carnegie is not here, that what he refers to is steel rails.

Mr. DAVENPORT. I would be glad to develop my thought a little, and then I would be glad to be interrupted with questions. What I

wanted to get now was a concrete statement of a case which is before the people of the United States, in the situation that is to be dealt with by the commissioner under the proposed bill. I will read this again:

If any good reason can be given for changing the price of any commodity the question will be promptly considered on its merits. Prices should at all times be reasonable and fair. The mere fact that the demand is greater than the supply—that the necessities of the purchaser are great—does not justify an increase in price, nor does the fact that the demand is less than the supply furnish an argument for lowering the price. In neither case would the quantity bought and sold be more or less.

What the manufacturers and purchasers both, as a rule, desire is stability of prices—the avoidance of violent and sudden fluctuations. In such times as these it is natural for an occasional purchaser to seek to influence reductions in prices for his particular benefit and without regard to his future and permanent interests, but it is exceptional. Misrepresentations are sometimes made and the seller, if not the public, is occasionally imposed upon. Hence the misstatements lately published. Some things may be depended upon at the present time. All these questions will be considered and treated fairly and without prejudice to the interests of the purchasing public. The steel manufacturers are in close and friendly intercourse and propose to continue these relations. They will not do anything that is contrary to the public welfare, but they will not be stampeded by irresponsible rumors. If the question of reducing or increasing prices shall be raised at any time during the next few months there will be deliberate and orderly consideration.

You will observe from this statement that there is in this country to-day an institution the president of which assumes to speak and to declare what shall be with reference to the prices to be charged for one of the essential commodities and necessities of a nation of 90,000,000 people. He speaks with the voice of the lawgiver. The law of supply and demand is to be ignored. The necessities of a particular manufacturer in some line of business which may imperatively require a reduction in the price of steel to correspond with the reduction of values of other things, are to be ignored. The price which is to be fixed shall not be fixed by competition between those who desire to purchase, nor shall it be fixed by competition between those who desire to sell, but it shall be fixed at the sweet will and determination, actuated by the best of motives, of course, of those who have the control of the product, the control of the determination as to the quantity that shall be produced, the control as to the prices to be charged between them, the prices that are to be quoted and given to those who must purchase. We have, I say, that institution in our midst to-day: and it was at such an arrangement as that, and such an institution as that, that this Sherman antitrust act was aimed when it was adopted; and it is now proposed in this bill to clothe an officer of the Government with the power to review all those questions. First, necessarily, what shall be the arrangement as to the output of the products; second, as to the prices that are to be charged and fixed by those who deal in them. When the demand increases and it is important to people to have these goods, the manufacturer is not to be permitted in response to the law of supply and demand to raise his price. When it goes down, he is not to have the privilege of saying, "You can have this for less." We have a dictator now, and an officer of the Government to whom this power is to be deputed under the proposed bill is to pass upon all those questions and decide upon the future course of things, and the question recurs, as I say, what is the nature of that power; is that an executive power, is it a legislative power, or is it a judicial power? There are all those

elements in it which make up a legislative power, under the decisions of the courts.

It is the same power that the Czar of Russia could exercise. If it were within the purview of the Congress of the United States to undertake all these things, Congress would be doing it by virtue of the legislative power, so that I want to call the attention of the committee to some cases that might throw some light on this power. I shall later, if you will bear with me, show you the horrible misunderstanding as to the necessity of competition in trade that exists on the part of the gentleman who issued that edict to the people of this country, and I only cite him as an illustration, because the others are supposed to do it, and none more than the great labor trust manager, Mr. Gompers, who appeared here in support of one part of the bill. I say I only cite this as an illustration, because very likely they are very wise and good men who thus undertake to dictate to the people of the country what shall be done—what they shall pay and what they shall receive. The committee will understand that Mr. Low, as he now states the proposition in his bill, proposes to have these arrangements presented to the commissioner, or whoever may be the gentleman to pass upon this, for future action. They are to go on; they are to relate to the future. There is an aspect in this bill, however, which relates to the past, which is a complete validation of all existing and past arrangements, which I will speak of later. In the case of the *Interstate Commerce Commission v. Railway Company*, to be found in 167 United States, there is a discussion as to whether the power to fix a future rate is a judicial act or an administrative act or a legislative act, and, of course, by analogy we can get some glimmer of an impression as to what the courts would say about this kind of a power proposed to be conferred on the commissioner, if they have not already said it, in relation to substantially the same proposition in other cases. Of course the question in that case was whether the Interstate Commerce Commission had the power to fix a rate to be observed in the future.

MR. LITTLEFIELD. That is the great case in which they passed upon the power of the Commission?

MR. DAVENPORT. Yes; it is here said.

It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act. (*Chicago, Milwaukee & c., Railway v. Minnesota*, 134 U. S., 418, 458; *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S., 362, 397; *St. Louis and San Francisco Railway v. Gill*, 156 U. S., 649; *Cincinnati, New Orleans, & c., Railway v. Interstate Commerce Commission*, 162 U. S., 184, 196; *Texas and Pacific Railway v. Interstate Commerce Commission*, 162 U. S., 197, 216; *Munn v. Illinois*, 94 U. S., 113, 144; *Peik v. Chicago and Northwestern Railway*, 94 U. S., 164, 178; *Express cases*, 117 U. S., 1, 29.)

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We have therefore these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varied and diverse conditions attaching to such carriage, is a power—

A legislative power, of course—

of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language.

Mr. Low. May I ask a question, which is simply where in the world in this bill does he discover the idea that anybody is to pass upon the question of prices or rates?

Mr. DAVENPORT. Why, it has got to be.

Mr. LITTLEFIELD. That is involved in your proposition as to what is a reasonable and what is an unreasonable restraint of trade.

Mr. Low. What he passes upon is the agreement or contract.

Mr. LITTLEFIELD. True, but the contract must produce some result on the public or the public has no interest in it. The whole essence of the law against monopoly is to prevent unjust extortion against the public.

Mr. Low. I understand that.

Mr. LITTLEFIELD. Judge Gary does not do anything else but fix prices.

Mr. DAVENPORT. He is fixing them for the future, and of course when he comes up to the Commissioner with his proposition it will be with a view to his own future conduct, and when we get along in the discussion we will be talking about what this gentleman is to do in passing on this proposition, as he passes on things relating to the future.

Mr. LITTLEFIELD. There must be some object of this legislation. What is the object of the Sherman antitrust act; and then, what is the object to the amendment to the Sherman antitrust act? The only interest that the public can possibly have in the management of business is the price to the consumer.

Mr. Low. I agree to that.

Mr. LITTLEFIELD. If you have a reasonable restraint of trade it proceeds on the hypothesis that the price is reasonable, and if you get an unreasonable restraint of trade it proceeds on the hypothesis that the price is unreasonable. It comes down finally to a question of what the price is. That is your proposition, is it?

Mr. DAVENPORT. It is absolutely certain that the power is vested in that authority, if the act is to have any effect whatever of determining what is to be done in the future as to these matters, and determining that they are reasonable or unreasonable.

Mr. LITTLEFIELD. Certainly.

Mr. DAVENPORT. And I say—we are now discussing this from a legal and constitutional standpoint—that that is a legislative act; and then of course would come the question, Can you vest a legislative power of that tremendous scope in even the President, much less in an officer of this kind?

Mr. LITTLEFIELD. The legal proposition is, Can you delegate legislative power?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. Are you going to quote further from that particular case?

Mr. DAVENPORT. I have other cases on that particular point, but it is sufficient to indicate here the part of it where they definitely say that the power is a legislative power.

Mr. LITTLEFIELD. Yes; and in that case the court held that the action did not delegate power, and therefore they did not go so far as to determine whether it could be delegated.

Mr. DAVENPORT. Certainly not. That, of course, is still an open question as bearing upon the question of rates, because in the Northern Securities case in 193 United States, the Supreme Court said



that if the Government can not stop such a combination as was supposed there, the public would be helpless, and they say it is suggested that this thing can be got at by Congress fixing the rates, and they say "If they have that power, on which question we express no opinion——"

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT (continuing). So far as the Supreme Court of the United States is concerned, as to the power of Congress to fix rates by act of legislation directly, it is an open question so far as the decisions have yet been made.

Mr. LITTLEFIELD. And, of course, to go a step farther and delegate the power would be another question still.

Mr. DAVENPORT. Yes. Now, we turn back a little to see what is involved in such a suggestion as that, fixing a simple thing like a railroad rate to determine whether it is reasonable or not. In the case of the United States *v.* The Trans-Missouri Freight Association (166 U. S., 331) the court proceeds to say:

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities; which is the one to which reference is to be made as the standard? Or, is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or, is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or, is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill-will of the road itself in all his future dealings with it. To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

That is what the court says about what has got to be inquired about in determining the comparatively simple question as to the reasonableness of a railroad charge, which is something which has been before the courts for years. Where a person has paid an undue rate to a railroad, or where any common carrier has charged an undue rate, the common-law courts, time out of mind, have permitted suits to be brought to recover the excess, just the same as where there is a question of what is a reasonable compensation for any other service, or what is a reasonable compensation under any kind of a contract. Those things have been before the common-law courts for generations; and yet when you come to apply a law of the character of this pro-

posed bill to the simple matter of determining whether a rate charged by a railroad company is unreasonable, and whether a combination to fix these rates is in unreasonable restraint of trade, to enable the combination to be sued by the Government, the Supreme Court of the United States says that the matter is practically insoluble, and that it would be practically leaving the matter of the reasonableness of the contract or combination to the decision of the parties themselves.

Now, all this bears directly upon the question whether or not this is a legislative power. It falls directly within the definition of a legislative power. It is where, upon unknown circumstances, judgment has to be exercised and rules laid down for future guidance. That is the legislative power, and when these gentlemen propose to vest the power that they do in these boards, whichever may be selected, they vest legislative power, and I come back to the proposition now that such a thing as that is unconstitutional because a legislative power can not be delegated, as has been sufficiently indicated in the authorities which have been brought to the attention of the committee already.

Mr. LITTLEFIELD. Your proposition, summed up, is that the proposition upon which this bill is founded comes down in its last analysis to the fixing of the prices of the products, and it being done by some board or tribunal, and that is a legislative function?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. To say that it is a reasonable price of course adds nothing and takes nothing away from the proposition.

Mr. DAVENPORT. We will take a concrete case, not for any invidious purposes, but as strikingly illustrating what sort of problems must be passed upon by the Commissioner. By the way, I am reminded from what I saw in the newspapers this morning of what a happy thought it was on the part of Mr. Low and his associates to take this load off from the shoulders of the Bureau of Corporations and put it onto some other tribunal, although he seems now to have overnight changed his mind about that. I see this morning that there is a so-called trust or alleged trust or a thought-to-be trust which has been the subject of criticism in Congress and out, whose officers have come down here to the Commissioner of Corporations and asked to be investigated, asked to have their whole business examined, to see whether or not it is a trust, and Mr. Smith, the Commissioner, answers these gentlemen and says that he can not investigate them because he is busy; he is overworked in regard to the other duties of his office; and if that be the case, if they suffer under adverse public criticism now, seeking to be protected from action by Congress in fixing tariff laws or other action, and he says that they will have to come some other time, they will have to come again, because he is too busy to attend to them, what would the situation be if that gentleman had not only that particular thing to examine, but all the hundreds and thousands, yes, millions, of matters which, if the proposed law, is enacted, is to be enforced or applied at all, he must act upon. It was indeed a happy thought, I think, on the part of Mr. Low to relieve the Commissioner of this burden by casting it upon the Interstate Commerce Commission.

Mr. EMERY. Would not such a condition as you describe give an added advantage to the thirty-day clause in certain portions of the

bill with respect to the immunity, where after thirty days there can be no disapproval?

Mr. DAVENPORT. Certainly it would; and those features in that bill, and lots more of them—they are as thick as blackberries—we have got to talk about when we come to that in the orderly discussion of the matter.

I forget how many of these organizations there are, but I read some four or five years ago a speech made by the distinguished chairman of this committee to which was appended a list of these organizations and combinations, nearly 500 of them, and I understood that the same list was put in in a speech made here on the 12th of December of last year; but whatever the number is, 500 or 600 of them, those existing institutions or combinations would be as completely legalized, after the lapse of a year from the passage of this bill, as ever was any of the monopolies granted by James I and by Elizabeth to patentees, which so distressed our ancestors and from which they fled across a stormy ocean into the wilderness to found a government which should be free from all such things. That is a diversion from what I was saying. This act legalizes those things as to existing trusts and combinations as completely as if James I had granted a patent to every one of them. But let us stick a little closer to the text.

Mr. LITTLEFIELD. The Chairman would like to say in passing that the last use of that list you speak of was made by Senator Davis. The Chair would like to have it understood that that does not alter the value of the list. The Chair is quite well advised of the use that has been made of the list since he introduced it.

Mr. DAVENPORT. I think it was a tolerably complete list, and I think it was furnished by some Government official. There again we are in doubt as to whether there are any such institutions in this country. Apparently they do not know of them up at the Department of Justice. I do not know any of them, but there is an alleged list. If there are any such, and Mr. Low is fortunate enough to secure Congressional indorsement of his proposition, at the end of a year every one of them will have a patent of nobility. They do not care about future trusts. They have got trusts enough now, these gentlemen. They have covered the field completely. I shall now quote the language of Sir John Culpepper as found in 83 U. S., 15 Wall, Slaughter House cases, as to what he thought of them then.

Mr. LITTLEFIELD. That is in that speech I made, also.

Mr. DAVENPORT. It is in that speech?

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. It sounds good.

Mr. LITTLEFIELD. I might say that it sounds very good.

Mr. DAVENPORT. I quote from this as follows:

They are a nest of wasps—a swarm of vermin which have overcrept the land. Like the frogs of Egypt, they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye vat, washbowl, and powdering tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokerage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical. Mr. Speaker, I have echoed to you the cries of the Kingdom. I will tell you their hopes. They look to heaven for a blessing on this Parliament.

Our existing monopolies are precisely the same things in principle. The Supreme Court of the United States says, in a case which I will quote to you, that precisely the same things exist to-day, in the eye of the law, as existed then. To continue my quotation from this case:

Monopolies concerning wine, coal, salt, starch, the dressing of meat in taverns, beavers, belts, bone lace, leather, pins, and other things, to the gathering of rags, are referred to in this speech.

I wanted to show you the attitude of this Government and the institutions of this people toward this kind of legislation, as affected by our fundamental law. Here is the situation from which our fathers fled to this country:

The peasant could not cross a river without paying to some nobleman a toll, nor take the produce which he raised to market until he had bought leave to do so; nor consume what remained of his grain till he had sent it to the lord's mill to be ground, nor full his cloths on his own works, nor sharpen his tools at his own grindstone, nor make wine, oil, or cider at his own press; the days of monopolies, monopoly which followed men in their daily avocations, troubled them with its meddling spirit, and, worst of all, diminishid their responsibility to themselves.

That is the condition that existed then by reason of a grant from the King, by reason of the exercise of his prerogative which our fathers complained of. Is there any difference in the eye of the law in the conditions which are sought to be legalized by this bill? I want to call your attention to what the Supreme Court of the United States says on that subject. I quote from 197 U. S., page 129, the case of the National Cotton Oil Company v. Texas:

It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a "condition produced by the acts of mere individuals." Its dominant thought now is, to quote another, "the notion of exclusiveness or unity;" in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other States and in a well-known national enactment. According to them competition, not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest and the power such unification gives. And that legislatures may so ordain this court has decided. (*United States v. E. C. Knight Co.*, 156 U. S., 1; *United States v. Trans-Missouri Freight Association*, 166 U. S., 290; *United States v. Joint Traffic Association*, 171 U. S., 505; *Northern Securities Co. v. United States*, 193 U. S., 197; *Swift & Co. v. United States* 196 U. S., 375.)

I guess what I have been saying recently is a digression from what I started to talk about, the problem that is to be submitted to this Government official to pass upon, to see whether there is not the most extraordinary legislative action involved in it. We will suppose that Mr. Gary, accompanied perhaps by his counsel, Mr. Jenks, comes up to the Commissioner of Corporations and details his situation, and says, "Now, some people are complaining of this. There is a man down here in this place that wants some steel and says he can not carry on his business unless he can get it at a certain price."

Mr. LITTLEFIELD. Before you leave that, I understand your contention on the authority of the decision of the Supreme Court of the United States is that the power to determine the reasonableness of any contract or combination is legislative.

Mr. DAVENPORT. Yes, as to its future action. It is necessarily so.

Mr. LITTLEFIELD. I suppose you have examined the authorities in the various States on that question, as to whether or not the fixing of a railroad rate is legislative when it operates in futuro?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. What is the decision?

Mr. DAVENPORT. They all say that the fixing of a rate for the future is a legislative act, and in some cases the constitutions of the States have been changed so as to permit commissions to do it. In one instance I think the matter came up before the Supreme Court of the United States, in which they said that, although it was not expressly provided in the constitution of that State that the commission could exercise legislative power, yet the supreme court of the State, which had the power to declare what the State constitution provided, had so declared, and therefore the matter was foreclosed, and did not present any Federal question for the Supreme Court of the United States.

Mr. LITTLEFIELD. That is on the theory that the decision of the State court is conclusive in construing the State statute?

Mr. DAVENPORT. Yes; as to its conformity to the State's constitution.

Mr. LITTLEFIELD. But do you find any decision that disputes the proposition that the power to fix a rate in futuro is legislative in its nature?

Mr. DAVENPORT. No, sir; I think not. The excellent judge in this very case (167 U. S.) cites authorities in support of it, and there is no doubt that the whole case is saturated with that proposition, and I should answer the inquiry of the chairman by saying that it is a legislative power, acting in futuro.

When I was interrupted I was considering the situation that would be presented by the advent at the Department of Commerce and Labor of Mr. Gary with his counsel, and the Commissioner being asked to give his visé to his proposed contract or combination. What is the first question that would be propounded? Of course it would be, "What price do you propose to charge under this combination? Do you expect to have a definite price? Do you want to be permitted to fix the price of the product either by controlling the production or by arbitrarily fixing the price? How do you arrive at that price?" It would necessarily involve, of course, an investigation of all the elements that go into the determination of the price. "Is that affected at all by combinations in other matters? We will have to investigate that subject." Having ascertained as best he could whether or not the price they fixed appeared to be reasonable from his standpoint, it would then become necessary to examine and consider the effect of that upon those people who are subject to the law of supply and demand, and not in any combinations, as to the effect upon their business of an artificially maintained price.

Suppose Mr. Gary said to him: "Well, now, look here; it is true, we will say, that the price is perhaps higher now than the conditions would warrant, but then, a while ago, when the demand was great, we did not raise the price, and therefore it is only fair that, having been good to the public in that case, we should be allowed to recoup a little by keeping up the price at the present time above what it would be if there was free play of competition." What is the Com-

missioner to say to that? He will of course weigh all these propositions. Suppose the inquiry is made: "Six months ago what were you paying for labor? What were you paying for the materials that went into the manufacture? Were they the same as they are at the present time?" After the examination of all these matters, which will of course take months to arrive at anything like an approximately fair conclusion on the subject, the question would come, Suppose that, having fixed that price, wages fall and other conditions fall after the price is fixed; does not that make it unreasonable? What is reasonable to-day becomes six months from now unreasonable. The price charged for steel in boom times is naturally higher than that which is to be charged in dull times. The point of it, Mr. Chairman, which I have endeavored in this crude way to illustrate, is that it is a legislative act, and there is no escape from it. Thank heaven, we live under the Constitution, and if you attempt such a revolutionary proceeding as to put the business and the peace of mind of the business men of this country in the hands of such a tribunal as that, the Constitution will protect them instantly. It is forbidden by the Constitution. We do not live under any such Government. Of course, you must consider that probably this law would be applied justly at first.

Mr. LITTLEFIELD. That is, you may assume it?

Mr. DAVENPORT. Yes; but the time is not always to be when we would have a conservative, prudent administration, as we have now. We may not always have a wise and great man as Commissioner of Corporations. We may not always have a prudent and cautious Congress, like the present one, which is not ever moved from its moorings. The changes and chances of this mortal life are such that you must understand that such a thing as this vested in the hands of any man would be a grave peril to the community, and I say, and I stand here and contend as a lawyer and a citizen, that the Constitution of the United States forbids it.

I have lots of things to talk about, but there is a gentleman here from New York who has been here two days, and he asked me if I would not suspend to give him an opportunity to be heard, and I will do so, although it breaks the continuity of my remarks.

Mr. LITTLEFIELD. I understand; it breaks the continuity, but not the continuation.

Mr. BIJUR. I appreciate the favor, but I do not want to interrupt your train of thought.

Mr. DAVENPORT. Oh, that is all right.

Mr. BIJUR. It is very good of you.

#### ARGUMENT OF NATHAN BIJUR, ESQ., OF NEW YORK CITY, N. Y.

Mr. BIJUR. I may not, possibly, so much interrupt the continuity of Judge Davenport's remarks, because some of what I have to say is directly in line with what he has been saying. Let me preface my remarks by stating that I appear on behalf of the Merchant's Association. You have heard our president, who informed the committee that our association had decided to urge upon this committee the need of a commission to investigate this subject, as a condition precedent to any legislation. That conclusion of ours was not arrived at in cavalier fashion, but only after careful thought and much argu-

ment. We appreciate the strong force of an appeal that something be done to remedy a condition which is regarded in many quarters as intolerable or an impediment to the business and industry throughout the country. We appreciate, I say, the need of trying to do something as promptly as may be. On the other hand, we feel that the difficulties of a problem such as the one brought up in this bill are so great and its complexity is so manifest and the effect of any legislation so far reaching that we respectfully submit that it is impossible, either within a short time or taking into account only the judgment and opinions and experience of a comparatively small group of men, to frame a law which will correct the evils as they exist and establish a permanent and useful system for the future. Indeed, in criticising and opposing this particular bill, we do it not in the spirit of hampering legislation such as is here proposed. On the contrary, we should like to do all we could to further it, and I submit that the very criticism that we make will indicate the difficulty of precisely defining the evils that exist or of adequately finding remedies to correct them, and I submit that this very criticism is the strongest argument why the subject should be thoroughly investigated by a commission or a committee, if you will—the form of it makes no difference to us—before any bill is drafted; and I may say that an added argument toward the same end is presented by a criticism, which I do not make, as to something which I recognize as one of the necessary elements of this situation, namely, the constant change of suggestions, the constant change of amendments, that come here, as this subject is being debated.

Coming now to the direct subject in hand, I think we must preface it by understanding what is sought to be accomplished by the legislation proposed. It is an amendment of the Sherman antitrust act. First, does the Sherman law require amendment? Of course it is claimed that its inhibition is so broad and general that it is impeding the industries of the country, and I think that that criticism is justified. Then how shall it be amended? Mr. Towne, our president, has already suggested what is in our minds, what was, I think, originally suggested by Judge Davenport some weeks ago, that such amendment should be in the direction of defining more precisely what evils were intended to be reached by the original bill.

Mr. LITTLEFIELD. As you go along with your suggestions, have in mind the general principle that you can not have any criminal legislation or any legislation that affirmatively undertakes to regulate and control business conditions that will not in many instances operate with depression and hardship. That is absolutely inevitable. Have that in your mind all the while, and see if you can differentiate.

Mr. BIJUR. That is very difficult, and it is because I find I can not do that, or we can not do it, that I say we should have a commission.

Mr. LITTLEFIELD. The difficulties are difficulties necessarily inherent in the subject-matter, and they can not be avoided by legislation.

Mr. BIJUR. It seems to me that when we come to that subject we must take it up concretely. Who are the people who complain of hardships under the Sherman antitrust act, and what is the nature of the hardships? Those are business questions; they are empirical questions. Where are the men who complain, and let us see where the shoe pinches, and then it becomes a question for the lawyers to

see whether we can devise any legislation within our Constitution; and perhaps it might be well to inquire of the men who complain of the evil what they would suggest as practical remedies, as we are accustomed to use the term, and after that it might be proper for counsel to show whether those remedies are possible.

Mr. LITTLEFIELD. In other words, let us know just exactly what they want to do, and then let us see how they propose to accomplish the result. If we approve of what they desire, that is one thing, and then if we approve of what they desire, can it be, within the legitimate bounds of Congress; that is your proposition?

Mr. BIJUR. I think so. First, we have an economic or business or practical question, and then after we have solved that, both in the definition of the evils and in the suggestion of practical remedies, it is time enough for us to draw a bill which may attempt to deal with those things in the manner permitted by our Constitution. I am not going even to pretend to be able to do this, though I may toward the close of my remarks suggest a few ideas in that direction; but I shall proceed at once to the subject which we have before us, namely, this bill, and see whether in discussing it these ideas will not develop. In the first place, I see in this bill two entirely separate ideas, the one of giving relief from the sweeping condemnation of the law, in that an attempt is made to differentiate between contracts that are reasonable and contracts that are in unreasonable restraint of trade, and that has been in substance the cry of the business men, I think. This bill suggests that under certain circumstances, on certain conditions, contracts that are merely in reasonable restraint of trade should become immune.

Mr. LITTLEFIELD. Before you reach that, because we would have a better legal foundation if the discussion would be from a common standpoint; you are a lawyer. Have you examined the question, so that you are able to advise the committee as to the precise character of the contract on which under the common law the element of reasonableness or unreasonableness is predicated?

Mr. BIJUR. I am afraid that I share Brother Davenport's view, that that question of reasonableness as applied to contracts is impossible of solution.

Mr. LITTLEFIELD. Would this suggest any recollection to your mind as to the legal situation if the chairman intimated that in his investigations he has only been able to find, in the language of the courts in applying common-law rules, the element of reasonableness and unreasonableness predicated upon contracts alleged to be in restraint of trade when one individual alone contracts himself out of trade?

Mr. BIJUR. As relating to the preservation of the good will?

Mr. LITTLEFIELD. The only relation in which the common law has ever used the terms "reasonable" and "unreasonable" where they were predicated upon restraint of trade has been in cases of that sort, as the chairman is advised, and the chairman is also advised that the courts have never put a construction upon "reasonable" and "unreasonable" as predicated upon conspiracies to monopolize trade. Have you ever seen anything in your reading that would controvert this suggestion that the Chair makes?

Mr. BIJUR. I have not.

Mr. LITTLEFIELD. That being the case, all this discussion proceeds upon contracts and agreements intending to monopolize, and has not



in any sense any reference to this simple contract where a man contracts himself out of trade.

Mr. BIJUR. No.

Mr. LITTLEFIELD. Now can you predicate this, as a scientific situation, in any manner upon contracts in trade?

Mr. BIJUR. I do not think you can predicate that upon contracts intending to monopolize trade, nor can you even predicate it upon contracts as a whole.

Mr. LITTLEFIELD. Those are the only kinds of contracts to which this particular amendment is directed?

Mr. BIJUR. I am not quite sure, Mr. Chairman.

Mr. LITTLEFIELD. It has only been suggested to the chairman in the course of the discussion.

Mr. BIJUR. I only want to point out that something can be suggested in this bill, namely, that there is no reference to any immunity, or rather to put it the other way, that under this bill, if the Commissioner of Corporations permits a contract to become immune from Government action, a contract in reasonable restraint of trade, that would also become immune from so much of the Sherman antitrust act as forbids monopolies. Whether that is done with the view that monopoly and restraint of trade are the same thing, I do not know; but they are not the same.

Mr. LITTLEFIELD. They are not the same, but they have the same elements.

Mr. BIJUR. But I must take it that they are different, because the Sherman antitrust act takes two separate sections to cover those two separate things, and if Congress had thought that the contract in restraint of trade was a monopoly, it would have been quite needless to pass the second section, which relates only to monopolies, and does not use the word "contracts." I shall come to that in a moment. I quite appreciate how the doubt arises in your mind, and it troubles me quite as much as it does you.

Mr. LITTLEFIELD. It is by no means certain that the men who drew the Sherman Act did not use more or less tautology.

Mr. DAVENPORT. That was very carefully considered.

Mr. LITTLEFIELD. You mean the Sherman Act, in these respects?

Mr. DAVENPORT. Yes.

Mr. BIJUR. I will point that out later.

Mr. LITTLEFIELD. The chairman is very familiar with the history of this act. The chairman would be very glad to have anybody point out in the discussion anything which relates to the question as to whether or not this language was more or less tautologous and more or less repetition.

Mr. BIJUR. In other words, a conservative view of a legislative act is that everything in the act was intended to have a definite meaning, and we should at least assume in this instance that two separate sections, in separate language, were intended to cover two separate thoughts; and unless we know something to the contrary I should prefer to rest on that assumption.

Mr. LITTLEFIELD. While this matter is not very material, it would at least illuminate the chair if you would establish the distinction between a "combination in the form of trust or otherwise" and a "conspiracy in restraint of trade or commerce." I understand that an agreement between two or more persons to restrain trade is a

conspiracy. The chair likewise understands that a combination between two or more persons is the same thing. The chair would like to be illuminated on the question of how an agreement between two people to restrain trade in violation of the Sherman antitrust act differs in legal essence from a conspiracy. There may be a very profound legal distinction there, and that is pointed out by Mr. Justice Holmes in the opinion in the Northern Securities case.

Mr. BIJUR. I shall come to that, Mr. Chairman, in a few moments; and I was about to say when we got off onto the other tack, that this proposed bill suggests a modification of the harshness, as I shall call it, of the Sherman antitrust act; and on the other hand it, as a compensation I should say to the people of the United States for the relaxation of the harshness of the law makes provisions, in the direction of closer supervision and more direct control over the affairs of such corporations or individuals as seek this relaxation or "immunity," as I think it is designated in the bill itself. That, I believe, is a very fair and impartial analysis of the two great purposes of that bill; relaxation of the Sherman law on the one hand, compensatingly closer supervision and control over those who seek that relaxation. That is a very big problem, Mr. Chairman. First, to relax the general terms of the Sherman law is a pretty big problem in itself, and when you couple with that the attempt to do something which so far as I have ever known is quite foreign to our system of government as it has existed up to the present time, namely—and I do not use this word in any bad sense, at all—to introduce a certain paternalism, you have a pretty big task cut out for you. It may be necessary, I am not now speaking of the wisdom of it at all, but when you attempt to impose a certain paternalism and the control and supervision of the great majority of the business of the country, you have a big task before you.

First, is there any desire for relaxation of the Sherman law? I shall not pretend to present all of these subjects in any detail. I think there is such a demand. Personally, I have heard it far and wide. The press is full of it. I will admit at once that to a very large extent this demand comes from people who are not thoroughly familiar with the Sherman law and are not thoroughly familiar with the decisions of the Supreme Court interpreting it. Nevertheless, if in the face of that law as it stands in terms on the statute books, and in face of the decisions of the Supreme Court, the business community of the United States is under the impression that its ordinary functions are impeded, that legitimate and necessary combinations, or joint contracts as you may call them, are made impossible, we have an evil that ought to be corrected; and let me say that for that feeling there is at least some good justification in authority. The dissenting opinion in the Trans-Missouri case, while it was a dissent, nevertheless was concurred in by four of our great judges.

Mr. LITTLEFIELD. Four?

Mr. BIJUR. Yes, Justices White, Field, Gray, and Shiras. I mean it is the view of those four judges.

Mr. DAVENPORT. I would inquire of Mr. Bijur if he is aware of the fact that all the cases which were cited by the minority have been by the Supreme Court held to be not within the operation of the Sherman act.

Mr. BIJUR. There is no question about what final authority has held on this subject. I am now merely adducing the fact. Whether this is a minority opinion or not, it is nevertheless the opinion of four of the judges of that great tribunal. I am not saying that this is correct so far as it relates to the law. The feeling throughout the country is that certain conditions in trade are continuing in defiance of the law.

Mr. LITTLEFIELD. That may be true, but the trade has not been injured. Since the Trans-Missouri case was decided we have had the most profitable business situation that ever existed, in spite of all this apprehension.

Mr. BIJUR. That is exactly the question which I say is one of those which should be ascertained. It is true that most of the great businesses in the United States are all carried on to-day in daily fear of Government prosecution, or with a feeling that they are by indulgence being permitted to violate the law. I am sure that such an impression prevails. I can not say that it is true as to any particular number of persons.

Mr. LITTLEFIELD. If it relieves you of any embarrassment, I would say that the legislative difficulties that exist in connection with the manufacture of paper invite not only the action of the Department of Justice but the action of a committee of Congress or anybody else that seeks to investigate that trust, because they insist there is absolutely nothing in all of their business that is in any way inimical to the Sherman antitrust act or any other; so that that element of difficulty would evaporate. That combination makes no complaint. The people engaged in that business make no complaint, but invite full investigation, and they are not hampered and embarrassed. I merely refer to it because that seems to be the great casus belli with them, in connection with that great industry of our country.

Mr. BIJUR. I am not speaking with that in mind, at all.

Mr. LITTLEFIELD. I did not say you had it in mind, but there is more objection to it than anything else in the country.

Mr. BIJUR. The idea is the result of conferences with many bankers and manufacturers throughout the country, and I think it is safe to say that there is a prevailing impression throughout the United States that the Sherman antitrust act as interpreted in the Trans-Missouri case forbids practically all large contracts embodying combinations, whatever they may be, and that fear was expressed to me concerning a particular case on the merit or demerit of which I express no opinion, but this gentleman said to me that they were so depressed now that they scarcely had meetings to talk over trade matters.

Mr. LITTLEFIELD. You have more or less clients who are interested in this. Without disclosing the names of your clients, tell me what your clients are doing in violation of the Sherman antitrust act. Give me a concrete illustration of what some of your clients are now doing that is violating the Sherman antitrust act, without disclosing the names of your clients.

Mr. BIJUR. If you will permit me the Yankee subterfuge, I will ask you a simple question. You are familiar with the decision in the Addison case, in which it was held that six and subsequently eight corporations which made a contract covering various States of the

Union, they being situated in various States, whereby they controlled the prices in such territory as they could cover, in which they had a sort of a pool at some times, and at other times what I think the Supreme Court designated as a private auction, where they practically awarded the business among themselves, and the others put in fictitious bids at little higher rate than the one to whom the award was made, were engaged in a contract which in the first place affected interstate commerce and in the next place was obnoxious to the inhibition of the Sherman antitrust act. Mr. Chairman, I would like to ask you this question. I am not sure that this is the fact, at all, but if those six or eight corporations should consolidate into one corporation and the stock in those corporations should be bought by one other corporation such as that which is called a holding corporation, and in addition to those the stocks of a great many other corporations in the same line, which were referred to in the opinion, were owned by one corporation, and it then necessarily does every day the very thing that these contracts agree to do, should not that corporation be equally obnoxious to the law? Yet those corporations exist by the hundred through the United States to-day.

Mr. LITTLEFIELD. In pursuance of the well-known Yankee privilege, I will ask you if you think that is in answer to my question? I will put that on the record. I will ask you, as another Yankee, whether you think that is an answer to my question, and if you want to go on record with that, all right. You can not catch the chairman that way.

Mr. BIJUR. I believe that every one of the great combinations in some particular line of industry necessarily sees before its eyes the fear that it is existing in violation of the Sherman law, because it is every day doing that which was held to be obnoxious in the Addison case, and I come right down to your remark, Mr. Chairman, that the final test of all this is the question of prices. Since the only object of the Addison case was to maintain prices, surely the chief object of the combination of such companies is to maintain prices, and that is what they are doing; they are combinations to maintain prices, and that is a perfectly legitimate function.

Mr. LITTLEFIELD. Having completed your explanation, I will ask you again if that is the only answer you have to make to my question?

Mr. BIJUR. No; I believe—

Mr. LITTLEFIELD. You know I do not press this at all. I do not ask you to name your clients; but you are here suggesting that I recommend some legislation, and it seems to me that I have at least the privilege of ascertaining the concrete conditions that somebody wants to have remedied, and I would like to know what you are now doing that you think you have not any right to do and that you want to be authorized to do, and I want to know what results you expect to accomplish when you are authorized to do it. Ought I not to know those things before I undertake to recommend any legislation?

Mr. BIJUR. I think you should.

Mr. LITTLEFIELD. Then let me know them.

Mr. BIJUR. But I would say that the position I am now occupying toward you, argumentatively, is not the position I occupy toward the committee, because I have said at the outset that I am not sure, and am not prepared to say, that those combinations or other contracts

to which I shall allude in a moment are in violation of the Sherman antitrust act.

Mr. LITTLEFIELD. Would you expect me, on my responsibility as a Member of this House, to recommend to it legislation that I could not give an adequate, concrete reason for?

Mr. BIJUR. I should not.

Mr. LITTLEFIELD. Can I properly and safely recommend this legislation until I get concrete facts such as I have requested you to give me?

Mr. BIJUR. My answer to that is, I think not; and that is the reason we say we would like to know—

Mr. LITTLEFIELD. That is the reason you want a commission?

Mr. BIJUR. Yes; if anything is to be done.

Mr. LITTLEFIELD. Yes; if anything is to be done. You have referred to the Addison Pipe case, with which I am somewhat familiar, as an authority. That company was dissolved. Have those people continued to manufacture pipe since?

Mr. BIJUR. I have avoided finding out, because I have used this case as an illustration in many instances; but I think that they have.

Mr. LITTLEFIELD. Has anybody discovered that there has been any embarrassment of the people who undertook through that combination to monopolize the pipe trade—that they have been embarrassed under the Sherman antitrust act? Have the companies themselves been embarrassed or have the people themselves been injured by reason of the dissolving of that combination under the Sherman antitrust act? If there has been any difficulty, I have never heard of it; have you?

Mr. BIJUR. No.

Mr. LITTLEFIELD. You used that as an illustration of a business arrangement that perhaps ought to be allowed to be carried out or organized into corporate form. Are they organized into a corporate form?

Mr. BIJUR. I think they have been. There are several of those pipe companies, and I do not know which one. I have purposely endeavored to avoid finding out. My point, with all due respect to you, I think you will admit, namely, that the very purpose of that contract is the necessary purpose and effect of every one of the great combinations.

Mr. LITTLEFIELD. That all may be quite true.

Mr. BIJUR. Now, if the evil aimed at by the Sherman law is the purpose of those contracts, why is not the evil aimed at in the Sherman law the same purpose when effected in a slightly different way?

Mr. LITTLEFIELD. What did they hold in the Northern Securities case?

Mr. BIJUR. I would say that the Northern Securities case affirms my view. The court put aside the form and looked to the effect.

Mr. LITTLEFIELD. The court dissolved the holding corporation.

Mr. BIJUR. Yes; and does not that throw doubt upon—

Mr. LITTLEFIELD. Did they hold that the court would look to the substance and not to the form, and if a corporation existed simply for the purpose of restraint of trade the court would look to the purpose and dissolve it? That looks right to your question, whether they can form a corporation for that purpose, does it not?

Mr. BIJUR. Yes, sir; I think it does. Do not misinterpret what I have said. Whether the plea or the cry that I have said is going up frequently is just or unjust, it is there. I think the people who are conducting the vast majority of the business of the country, so far as it is carried on by the big corporations—and we all know that that constitutes practically more than 51 per cent of the business of the country—are now constantly afraid that they are conducting their business in violation of that law. But you have asked me for other illustrations. Take all those contracts like the ones cited by Mr. Schiffin, of which thousands did exist—I do not know how many exist to-day, but I know that some exist—where men try, whether they be distributors or manufacturers, to combine for the purpose of what they call cut-throat competition. I do not think it is a justifiable purpose. I am not passing on that.

Mr. LITTLEFIELD. You heard the statement of Mr. Jastro?

Mr. BIJUR. Yes.

Mr. LITTLEFIELD. If that be used here as a concrete instance for the purpose of affecting the action of this committee, it is up to me to say, when I get around to it, whether I approve or disapprove of the appeals of the wholesale druggists to take hold of it. Do you approve of it?

Mr. BIJUR. I should prefer not to answer that.

Mr. LITTLEFIELD. But are you not here for the purpose of affecting my action one way or the other?

Mr. BIJUR. Yes.

Mr. LITTLEFIELD. Do you want me to take a responsibility that you will not take?

Mr. BIJUR. No, sir.

Mr. LITTLEFIELD. I have got to take it.

Mr. BIJUR. I plead for more light, and if you ask me whether in my present state of mind I can answer the question, I say no. I am not prepared to answer, because I have not had the facilities for getting information.

Mr. LITTLEFIELD. You have heard everything that I have heard on it.

Mr. BIJUR. Yes; but I do not think that is enough. In fact, I do not think I have heard one-tenth enough to make me determine to what extent a combination or any form of joint venture may go. I am not going to shirk that issue so far as it relates to this bill, but I am not here advocating either that monopoly is good or bad, or that contracts in restraint of trade are good or bad. I am speaking to this particular bill for which I was assuming that there is some demand.

Mr. LITTLEFIELD. That comes as near involving the whole question as the bill itself.

Mr. BIJUR. I think that is just the trouble.

Mr. LITTLEFIELD. Then you do not advance the argument much by saying that you are not here to say that monopoly is either good or bad. It is pretty hard to establish the line of demarcation between what involves monopoly and the bill itself.

Mr. BIJUR. No, sir.

Mr. LITTLEFIELD. I would be glad to have you make the differentiation.

Mr. BIJUR. No; I was assuming, you must assume, that the gentlemen who are here advocating the bill are doing it for the public interest, and my contention was——

Mr. LITTLEFIELD. I hope that nothing that I have said can be construed as an intimation to the contrary.

Mr. BIJUR. No. We say we want to modify the Sherman anti-trust act, and I say you are not doing it intelligently or effectually in this bill, and I say if you want to amend the Sherman anti-trust act and want to do it intelligently and consistently, I want to investigate the facts first, and then I want to know precisely to what extent you want to amend that law. Are you going to try to make a differentiation as to size or method of operation or form of contract, because I confess I can not make this differentiation?

Mr. LITTLEFIELD. You have evidently reached the place where Mr. Low started. He said that he did not know what a reasonable restraint was, and that he did not know of anybody else who did.

Mr. BIJUR. I think you have in succinct form stated the chief vice of that bill. To me it seems to be a statement that we do not know what it is we want to forbid or allow, and we are going to let the Commissioner of Corporations worry about it, and I do not think that that vice is remedied by altering it and saying, "We are going to let the judiciary worry about it," because I believe that Judge Davenport is quite right that the judiciary, so far as represented by the Supreme Court, has indicated that it would not know what to do with it, and I will refer to that if you will permit me to proceed.

Mr. DAVENPORT. Excuse me for interrupting you.

Mr. BIJUR. I do not object to interruption. I think I am right that there is this desire, and that it is legitimate.

Mr. LITTLEFIELD. Of course there is this appeal you speak of.

Mr. BIJUR. Let us assume that the people want some change, and let me say this, that an examination of the debate that preceded the passage of this law in the shape it now is in in the Senate is exceedingly instructive, and I am indebted to Mr. Davenport and Mr. Emery for calling attention to it. It gives us some light on the consciousness of some of the Senators of how ignorant they were on the subject, and shows that they consciously acted knowing how ignorant they were. Senator O. H. Platt, of Connecticut, always said that this thing was far too broad, and would do far more mischief than good.

Mr. LITTLEFIELD. And he followed it up with his vote.

Mr. BIJUR. He followed it up with his vote.

Mr. EMERY. He was the only one who did?

Mr. BIJUR. I think the only one who voted against it. Senator George and some of the other Senators said, for example: "If we are going to forbid combinations of capital, it must be understood that we are going to forbid combinations of labor;" and I think it was Senator Edmunds who said: "I deprecate this tendency, because it seems to indicate a war of classes." But what I had more particularly in mind than those remarks was one made by Senator Hoar, who I think, after the bill was reported in its present shape, said he thought it merely reenacted the common law. He was a member of the Judiciary Committee that reported the bill, and he said "I think that this bill merely reenacts and reasserts the doctrines of the common law." Of course, there was much criticism of the particular terms of the bill, and Senator Edmunds—and this is the particular

thing I wish to call your attention to—who was chairman of the Judiciary Committee at that time, said in his plea: "Let us pass this bill in its general terms, because they are the best we have been able to evolve out of some eighteen months of debate, and the various propositions submitted to us, and let us from time to time amend it, if, as, and when, necessity arises." So that really those who address themselves to this amendment have behind them, I might say, no more than the suggestion of the great authority on this subject that the bill might require amendment, and that consciously he voted for it, knowing that it might be too broad.

Mr. SCHULTEIS. Will you please give me the reference, where Senator Edmunds made that statement.

Mr. BIJUR. I think he said that on April 8. If that is not accurate, when I have finished I will give you the exact reference.

Now, let us assume that the bill is to be amended.

Mr. LITTLEFIELD. We will assume for the purposes of the debate that it is not sacrosanct, and we can touch it if we want to.

Mr. BIJUR. Yes, we will assume that it is not sacrosanct. I believe that the gentlemen who have proposed it in the form in which it originally came to us appreciate the difficulty raised by the use of the words "reasonable" and "unreasonable." There is very little need to dilate on that. Judge Davenport has covered it completely.

Mr. LITTLEFIELD. What do you say, as a legal question, about Mr. Davenport's doubt as to the importing of the words "reasonable" and "unreasonable" into the bill, as to whether it would vitiate its criminal features?

Mr. BIJUR. I think it would. I remember in the Nebraska Commission case the Supreme Court was called upon to determine the reasonableness of the rate imposed upon the railroads by the Nebraska Railroad Commission. They said in their opinion, "This is no small task, but we shall not shirk it," and they proceeded not to shirk it through fifteen printed pages of careful reasoning.

Mr. LITTLEFIELD. That is the case of Smith and Ames?

Mr. BIJUR. Yes. Then they said, "We have voluminous testimony before us to enable us to determine it"—I think they had 5,000 pages—and through these fifteen pages they analyzed that testimony, and what was the conclusion that they came to? They concluded that the rates imposed were not equal to the cost of carriage of the freights.

Mr. LITTLEFIELD. It did not become necessary to determine the question what the reasonable rates were?

Mr. BIJUR. No.

Mr. LITTLEFIELD. Those rates were practically confiscatory?

Mr. BIJUR. They were practically confiscatory.

Mr. LITTLEFIELD. I see you are quite familiar with that. Are you advised of any case, of either the State courts or the Supreme Court of the United States, that lays down definitely the legal elements upon which a reasonable rate can be predicated with certainty? Smith and Ames does not do it.

Mr. BIJUR. In *Smith v. Ames* they intimate that the cost of the road and various other circumstances and elements of cost ought to be considered in determining. In the *Trans-Missouri* case, as Judge Davenport has so well pointed out, they virtually say that while



those things ought to be considered, there may be so many others besides that they really doubt whether it is possible to determine.

Mr. LITTLEFIELD. Have you examined the case of Waterville v. Waterville Water District in Maine?

Mr. BIJUR. I do not recall it precisely.

Mr. LITTLEFIELD. This is rather aside, but I think you will find in it the most exhaustive discussion of the legal elements; but that does not attempt to determine what the legal elements are. It goes over the question more thoroughly than any other case I know of. The significant feature about it is that even that does not lay down with distinctness the legal elements.

Mr. BIJUR. Of course it must not be forgotten that the Nebraska Commission and the opinion in the Trans-Missouri case relate to the reasonableness of rates, and that is a comparatively simple question, and if the Supreme Court of the United States said it did not know what it would have to do if it had to determine the question of reasonableness of rates as an abstract proposition, what would it say on the proposition as to what constituted a reasonable contract or a contract in restraint of trade?

Mr. LITTLEFIELD. To come right down to that, would a contract be in reasonable restraint of trade that resulted in enabling the contracting parties to charge an unreasonable price for their product to the consumer, in your judgment?

Mr. BIJUR. It certainly would not; but I can see other elements of unreasonableness.

Mr. LITTLEFIELD. In the last analysis is not the price to the consumer the supreme test?

Mr. BIJUR. It is the supreme test of the reasonableness of the contract, but not always, for this reason: Take the case of a monopoly. The courts have never bothered about the question whether a contract or combination is a monopoly, but they say it will tend to be a monopoly, and you will remember that in a number of cases contracts and combinations were condemned, even though they had reduced the price.

Mr. LITTLEFIELD. That is quite true. Tending to monopoly is imported into our jurisprudence because we have not the monopolies, outside of patents and copyrights, that they have under the English jurisdiction.

Mr. BIJUR. There are natural monopolies. Take the man who owns the only tin mine or the only lead mine.

Mr. LITTLEFIELD. That is so only so long as he owns the only mine. The fact is that if you were only to prohibit the contract that is a complete monopoly you would not prohibit any.

Mr. BIJUR. There are no complete monopolies.

Mr. LITTLEFIELD. What harm does a contract that tends to monopoly do except as it tends to increase the price to the consumer?

Mr. BIJUR. I do not know. It seems to me that in the last analysis the words "control or supervision by the Government" means the control and supervision over prices.

Mr. LITTLEFIELD. So that when you get to the ultimate analysis the price to the consumer is the supreme test?

Mr. BIJUR. I think it is.

Mr. LITTLEFIELD. Otherwise, the public has no interest in the controversy, has it?

Mr. BIJUR. No.

Mr. LITTLEFIELD. Come right down to that. You say that a contract, to be in reasonable restraint of trade, must be such a contract as would enable a reasonable price to be charged to the consumer.

Mr. BIJUR. That is simply putting the same question in another form.

Mr. LITTLEFIELD. Yes. What is the reasonable price to the consumer? How much return is the manufacturer entitled to receive on his capital?

Mr. BIJUR. The reason I approached this question with so much deference, and in fact I might almost say awe, is because I see that in attempting to insert that clause in there, we are departing from the system of individualism.

Mr. LITTLEFIELD. Would you say that 6 per cent was a fair return?

Mr. BIJUR. I would say the answer of the Supreme Court was the only answer to that, namely, that a reasonable price was a price fixed by actual competition.

Mr. LITTLEFIELD. That would only involve, so far as legislation is concerned, a measure that would preserve competition.

Mr. BIJUR. Yes.

Mr. LITTLEFIELD. That would contraindicate legislation like this.

Mr. BIJUR. What is that?

Mr. LITTLEFIELD. Of course your postulate you just gave would contraindicate legislation like this.

Mr. BIJUR. Not entirely. I think we have to think of the proposition that a monopoly may reduce prices. I think that the economic proposition can very well be sustained that, granting other human qualities which I do not necessarily assume, a combination may, by good organization, by the saving of friction, and by the saving of waste, largely reduce the cost of its final product to the public, and be a real benefit. I do not know that we have many such angels about, but, theoretically, that is true.

Mr. LITTLEFIELD. I was just going to ask you to give us an illustration of some of those divine operations going on that have ultimately reduced the price of the product when the competition is entirely eliminated.

Mr. BIJUR. The reason I spoke about that is that it is claimed that they do exist, and I am prepared to listen if they want to demonstrate it.

Mr. LITTLEFIELD. They do exist, but they do not care to be definitely and clearly described and placed where, in the language of Shakespeare, they will have a local habitation and a name.

Mr. BIJUR. At all events it must be admitted that, simply as human knowledge goes, as we gather from time to time in our walks of life, there are many combinations that can be held to be in restraint of trade, or monopolies, which, by the wisdom of their operation, have really done some good.

Mr. LITTLEFIELD. As an academic proposition that may be conceded; but bearing upon this question, what is a reasonable price, and what that may be predicated upon, I want to ask you this, further to get your view of it. We will assume now, a large corporation which has among its constituent corporations that make up its whole, which may perhaps have been eliminated so far as their legal entities are concerned, having been absorbed in the one, one that

cost originally \$150,000 to create, but which is now represented in the aggregate on the basis of \$1,500,000, ten times its original cost. In your judgment, is a reasonable price to be predicated on that \$1,500,000, or on the \$150,000.

Mr. BIJUR. In my opinion that capitalization has no reference whatsoever to the reasonableness. If I had to pass judgment on the reasonableness, I should never look at the nominal capital stock.

Mr. LITTLEFIELD. Would you eliminate the \$150,000, or eliminate the extra \$1,350,000?

Mr. BIJUR. I should not think about the stock capitalization.

Mr. LITTLEFIELD. Then you would come down to the \$150,000?

Mr. BIJUR. I think I should, or to its present value by ordinary market conditions.

Mr. LITTLEFIELD. So that you would come down to the actual value, and if it had shrunk to \$75,000 you would predicate the fair price of the product of that corporation on that \$75,000?

Mr. BIJUR. No, sir; I would then reach the stage where I would give it up and say there was nothing to be done but to let that go on as it had in the past.

Mr. LITTLEFIELD. If you were Commissioner of Corporations you would lay down and say "Let time elapse."

Mr. BIJUR. Your assumption is an impossibility. Under this bill I would never be the Commissioner of Corporations.

Mr. LITTLEFIELD. It is said that there are corporations in existence that in order to control the output and regulate the price have found it necessary to buy up plants and destroy them in order to eliminate competitors. Is the money thus expended for the purpose of enabling them to increase the price of a product, and for no other purpose, a legitimate basis of capitalization upon which a fair price can be predicated in order to reckon a fair return?

Mr. BIJUR. While you are putting that in the form of a question to me, I take it you are merely trying to emphasize the difficulties of arriving at any form of standard; because that is, in our present state of learning, impossible. I think there are twenty different considerations which might enter into the answer to that particular question of yours. It may be that a person who has invested in an enterprise is entitled to some return, whether it succeeds or fails. It may be that the combination, by buying up a plant at a comparatively small price and dismantling it, has been able to take some of the machinery and put it into another place where it had room, and has done an economically good thing. But it may be, on the other hand, that the sole purpose of that is to reduce production and control prices.

Mr. LITTLEFIELD. That was the hypothesis upon which I asked the question.

Mr. BIJUR. If that were true, the public interest or the consumer's interest surely would demand that he should not make a return on this dismantled plant.

Mr. LITTLEFIELD. Should not all these things be investigated under this bill?

Mr. BIJUR. I do not see how you could avoid it.

Mr. LITTLEFIELD. How long do you think it would take the Bureau of Corporations to ascertain the essential and necessary facts about the 150 original corporations? Could they do it in a year?

Mr. BIJUR. I do not think it is possible.

Mr. LITTLEFIELD. Then they would get a clean bill of health without any examination, under this bill.

Mr. BIJUR. Of course that brings out somewhat forcibly the question that was originally suggested by Mr. Towne, and has been dilated upon by Judge Davenport, that the attempt to put in the hands of any one executive officer the determination of questions so complex is useless, and as a practical matter it seems to me this bill would impose that duty on the Commissioner of Corporations. I think it is an impossibility. I think it is quite impossible, as a practical matter, utterly regardless of whether it is constitutional or not.

Now, take the other side of the bill, as to the registration and the conditions upon which registration may be granted.

Mr. LITTLEFIELD. Are you going to discuss the kind of power that the bill vests in the Commissioner of Corporations?

Mr. BIJUR. I shall touch on that lightly. Take the other side—of the Government supervision and control. Of course you have practically, Mr. Chairman, suggested in advance some of the thoughts I have on that, namely, that supervision and control is there, or of what use is it if it does not relate to prices? What is all this information for, what shall the commissioner do with it, if it is not to determine whether the prices charged through or fixed by this contract or combination which is submitted to his determination are reasonable prices or not? I presume no one would suggest that the Government simply wants to pile up a great encyclopedia of unrelated facts. The purpose is to enable the Commissioner of Corporations, or whoever it may be, to pass intelligent judgment on these contracts. There is, I think, a further thought in the bill, namely, publicity. I see it in reading between the lines, and I think it is not a concealed purpose, that this information to be given by corporations will form a chance for public opinion to operate.

Mr. LITTLEFIELD. That is one of the important features of the bill, is it not?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. Some people might think it the most important. From the standpoint of Mr. Jenks it is a very important factor in the bill.

Mr. BIJUR. I again meet the difficulty that I find in the other part of the bill—of the impossibility of arriving at the information. Who is going to get at this? There are millions of corporations, I assume, throughout the United States, certainly tens of thousands, and they are going to give information as to their corporate proceedings and their financial conditions and things like that, and I do not see what can be done with that. The volume of it would be so tremendous that it would not be possible to handle it, and if it is to be made public, what judgment is to be exercised as to what shall be made public; and what right has any particular officer or person to pick out any particular things and make them public? That mass of material, it seems to me, is one of the physical impediments to the operation of this proposed measure.

Mr. EMERY. You have spoken of the impracticability of the operation under this law. Have you given any thought to the wisdom of transferring the powers now vested in the Commissioner of Corporations and the Interstate Commerce Commission to any other Depart-

ment or bureau of the Government, either the Department of Agriculture or the Pension Office?

Mr. BIJUR. I can not see how it would be possible intelligently to deal with that mass of information; and unless it be demonstrated to me that it can be done, I am of course opposed to it.

Mr. LITTLEFIELD. Then you think it would be unworkable?

Mr. BIJUR. I think it would be unworkable.

(At 1.05 o'clock p. m. the subcommittee took a recess until 1.30 o'clock p. m.)

#### AFTER RECESS.

The committee reassembled, pursuant to the taking of the recess, at 1.30 o'clock p. m., Hon. Charles E. Littlefield in the chair.

#### ARGUMENT OF NATHAN BIJUR, ESQ.—Continued.

Mr. BIJUR. Let me say that in discussing these economic questions I do not pretend to do it thoroughly; I am not even an economist; but I feel that they must be discussed to the extent to which their bearing on the legal question is involved, and of course the connection between the economic aspect and the legal aspect of this bill is very patent.

Continuing on the provision of the bill that requires the furnishing of information, I have just said that this information would be such a mass, that it would be so voluminous that it could not be handled and certainly could not be intelligently dissected and made use of. Information as to the corporate organization or corporate proceedings and the financial condition of a corporation would by no means touch the abuses that it is aimed to correct, either in the Sherman antitrust act or in this measure now before us.

Mr. LITTLEFIELD. In that case, if you are correct in that assumption, upon what hypothesis can such information be properly required under our act to regulate commerce?

Mr. BIJUR. I am coming to that in a moment. I have tried, so far as possible, to talk on the economic aspect of it, and then see how we stand under the Constitution. I was thinking of the evils that have been spoken of in connection with restraint of trade and monopoly, and let me call attention to what is, I think, a minority report submitted in the House of Representatives, either at the time of the Sherman-law debate, or at the time of the debate on the proposition to amend the Constitution in 1900, which you will recall, by strengthening the power of Congress over commerce within the State. Congressman Parker said then, and I think it was during the debate on the Sherman law: "Do not let us have this wholesale condemnation; let us try to reach only the particular evils which we wish to correct;" and the two great evils are the reducing of the price and the selling of goods at a low price in one place in order to break down prices, while prices are maintained by the great combinations in places where no combination is to be reached, or is fighting against them; in other words, it might be called internal dumping, instead of the international dumping which we hear so much of.

Rebating, I think, we need not discuss so far as the railroads are concerned, because it seems to be reasonably assumed that the Elkins law of 1893 has pretty effectively disposed of rebating in con-

nection with the enforcement of that law recently; but take, for example, this intrastate or interstate dumping, this beating down of competition by lowering prices in one place and maintaining them in another; that would not show in a corporate contract or in corporate proceedings. Take all the harsh and tyrannous methods that are spoken of as prevailing in those cases; those conditions would not be reached by the immunity. Those are all things that are done by individual agents under the direction of the president or of some other executive officer, and they are done by word of mouth.

Mr. LITTLEFIELD. And they are not a matter of record.

Mr. BIJUR. And they are not a matter of record. So I say that if the one great purpose of this bill is to reach, either by direct regulation of an executive officer or by publicity, the evils supposed to attend upon the existence of monopolies and combinations in restraint of trade, the category of information contained in this bill is not sufficient to expose those evils or to enable these particular acts or methods to be made public, and thus be corrected.

Put in a very concrete way, or to introduce in a very concrete way the legal aspects of these two phases of the bill, let me present this for your consideration, Mr. Chairman. Suppose a contract or the terms of a combination—I will call them always contracts—be presented to the Commissioner of Corporations, for him to pass upon it. He is to determine whether it is in reasonable or unreasonable restraint of trade. I will assume that those words will be substituted by others of similar import and of possibly slightly different significance. Assume that those words have been interpreted by courts as incomprehensible, and that we are to use some other words equally general. I think other words possibly better might be devised. What will the Commissioner of Corporations do? Will he decide arbitrarily? Will he look at this contract and either in connection with other information furnished to him or without anything else, just say "I do not like this; it is bad; I think it is unreasonable and detrimental to the public interest," or whatever other phrase he may use? No. I suppose that none of the proposers of the bill would say that the business interests of the country should be subjected to the whim of any executive officer. No; he must adopt certain rules.

Who shall determine whether he shall adopt certain rules or not, or whatever other general form or standard is given to him? Now, if he is going to have a set of principles or rules and regulations, or theories, by which he is going to reach that determination, why not insert it in the bill? It seems to me there we reach the horns of a dilemma presented by the very essence of this bill. Either you must admit that this is a problem so difficult and complicated that you can not lay down a standard, or you must say "No, the Commissioner of Corporations can lay down a standard, and he will adopt a certain rule;" and then I say, put it into a bill, and then people will know where they stand. Mark you, we who are lawyers are called upon every day to advise our clients whether what they are doing is within the purview of this or that statute. If there is no standard, if the action of the Commissioner or other executive officer is to be arbitrary, there is no use in asking us that question; we can not tell. If there is a standard which he will adopt, then put it down in black and white in the bill. That, of course, merely emphasizes the plea we have made here before, and which Mr. Towne and Mr. Daven-

port have made, for a precise definition either of the evils you are aiming at or of the exemptions that you will omit from the general condemnation of the bill. A precise definition of the evil is the first prerequisite to any attempt at correction, and equally, it seems to me, precise differentiation and definition of what is wholesome is the first prerequisite to a bill of exemption or immunity.

With that general statement let us pass to the purely legal aspect. What is the power to be committed to the Commissioner, or whatever individual it may be?

Mr. LITTLEFIELD. What is the nature of the power—executive, legislative, or judicial?

Mr. BIJUR. Yes. We will, I think, have to refer to a few axioms in order to understand it thoroughly. First, the liberty to contract is a right created by the Constitution secure against invasion by either the national or the State legislature, so that in the absence of any inhibition, anybody can make any contract he likes. Congress may forbid the making of any such contract in the exercise of everyone's personal right, to the extent that public policy as judged by Congress demands; and so it is in the exercise of that right forbidden in this Sherman antitrust act to make contracts in restraint of trade. Congress can not forbid a contract just because it pleases Congress to forbid a contract. The decision of Congress must appear to be based reasonably on some relation to public policy; and of course the converse is true that any exemption from a general inhibition must also be based on reason, and must have some relation to public policy.

Mr. LITTLEFIELD. Does not that definition come pretty near the police power?

Mr. BIJUR. It is practically the police power as applied to Congress.

Mr. LITTLEFIELD. Is there any Federal police power?

Mr. BIJUR. Oh, yes; there is a Federal police power as to matters within the jurisdiction of Congress.

Mr. LITTLEFIELD. That, of course, is a pretty general statement. Congress legislates for the District of Columbia and the Territories in the exercise of what is called municipal jurisdiction; but *quoad* its Federal power, which is entirely distinguished from its legislation for the District of Columbia and the Territories, has Congress any police power?

Mr. BIJUR. I did not use the word "police power" advisedly. You suggested it. I say it may be that, in a qualified sense. I would like to put it in this way, that in so far as relates to interstate commerce and any of the subjects specially committed to Congress, it can restrict or enlarge, or possibly in some cases forbid, the exercise of personal rights, provided public policy seems to demand it.

Mr. LITTLEFIELD. Under the commerce clause? Does not that remove the exercise of the power under the commerce clause altogether from the theory that it is an exercise of public policy? Public policy may not be at all connected with the regulation of commerce. Do you think under the commerce clause we can do anything?

Mr. BIJUR. No, I did not mean my statement to be taken so broadly. I was thinking in that entirely of interstate commerce as a subject over which Congress has jurisdiction.

Mr. LITTLEFIELD. Yes.

Mr. BIJUR. I am going to limit myself on these distinctions.

Mr. LITTLEFIELD. Is there a police power quoad that jurisdiction?

Mr. BIJUR. No, I do not think the words "police power" should be used in that connection, and what the Supreme Court said in the Trans-Missouri case and in the Northern Securities case and other similar cases is that Congress might, in so far as it saw these needs of interstate commerce, or a wise policy as applied to interstate commerce is concerned, limit the personal liberty of the individual to freely contract. It is a very limited statement, and yet a rather broad one. The Sherman antitrust act is an exercise of that power. It says to an individual "Although you have the right to make any contract you like, you shall not make a contract that restrains interstate trade." Now it is proposed to make an exemption in respect of that inhibition; and on what does this exemption depend? Congress is not saying in this bill "We have forbidden all combinations in restraint of trade because we want to protect interstate trade against such combinations, and now we make certain exceptions." It may be an absurd simile, but let us say, suppose that you specified combinations in respect to the manufacture of armor plate for the Government. That may be the expression of some principle applied to that commerce which Congress desired to exempt from the general inhibition of the law. But this bill does not say that; it says there shall be exempted from the operation of the law such contracts as the Commissioner of Corporations shall determine in his opinion are either reasonable or not obnoxious, or whatever those general terms may be. Where does that law get any validity from, so far as the powers of Congress go? Congress could not arbitrarily say that men should not make contracts with reference to hair brushes, if there were no possible purpose that could be subserved; and equally it seems to me that Congress can not say that no contract in restraint of trade shall be permitted, but men may make contracts in restraint of trade applied to blue pencils.

That is legislation applied to interstate commerce. The rules or regulations that Congress determines upon, the principles that it enunciates, must have some relation to the interstate commerce which Congress designed to regulate. That is a principle that has been laid down so often that it is hardly necessary to allude to any authorities, but of course it is all brought up again in the employers' liability cases very prominently. So it seems to me that the awarding to any executive officer of the right to exempt from a general principle applied to interstate commerce as enunciated by Congress—the awarding of the right to that executive officer to give immunity is beyond the power of Congress. Congress may award that immunity in the exercise of its judgment based on public interest.

Mr. LITTLEFIELD. Do you not think the Constitution inhibits Congress from granting that power?

Mr. BIJUR. There is no provision of the Constitution which inhibits; it is the other way around.

Mr. LITTLEFIELD. There is nothing that authorizes it?

Mr. BIJUR. There is nothing in the provisions of this bill which is warranted by the interstate powers of Congress. It is not a regulation of interstate commerce or an exemption from the regulation of interstate commerce to say to an executive officer, "Whenever you think that a person ought to be exempted, from reasons that enter your mind, or according to your best judgment, you are not subject



to this rule." That is not establishing any rule or regulation that is in relation to interstate commerce.

Mr. LITTLEFIELD. That is, it is not inhibited by any affirmative proposition, and is not authorized by this one?

Mr. BIJUR. As it seems to me, it has no relation at all to the power of Congress over the commerce between the States. It is getting entirely beyond anything pertinent to the regulation of that commerce, because it is permitting the opinion of one man or of six men, on some business consideration that may be in their minds, to grant exemption from a general principle imposed by Congress upon the conduct of interstate commerce over which it has control and jurisdiction. Have I made myself clear?

Mr. LITTLEFIELD. Yes; I think I get your point.

Mr. BIJUR. It is fine, but I think it is clear, and it is suggested largely by the distinction drawn by the Supreme Court in the Employers' Liability case. I shall make another application of the same principle to one of the other provisions in the bill in a moment.

Mr. LITTLEFIELD. I suppose that the result of the action of the executive officer regulates commerce as much as the original inhibition regulates commerce?

Mr. BIJUR. Then we would have a delegation of power. That is another thing.

Mr. LITTLEFIELD. Here you have the prohibition of a contract which is a valid exercise of the power under the commerce clause. Now, if you relieve from the prohibition of that same contract, will it not to the same extent and on the converse exempt from the regulation of commerce?

Mr. BIJUR. Take a simile which is an absurd one, but which will make my point clear; you release all red-headed people from that inhibition. Is that valid?

Mr. LITTLEFIELD. "Red-headed people" are not inhibited in the original contract. The prohibition in the contract under the original Sherman antitrust act is not predicated upon whether they have red heads or not.

Mr. BIJUR. Exactly. So you may take a case where it might say that all people with blue eyes and red hair, or all people whose names begin with B, may make contracts in restraint of trade. I would hesitate to make such a ridiculous assumption, were it not that the Supreme Court of the United States in the Employers' Liability case makes such assumptions. There is no connection there with rules or regulations that govern commerce.

Mr. LITTLEFIELD. That is, the condition is not connected.

Mr. BIJUR. The condition is not connected.

Mr. LITTLEFIELD. The contract in itself may be regulated by Congress, but the condition upon which you propose to affect the contract is not regulation of commerce.

Mr. BIJUR. That is my point.

Mr. JENKS. Would you apply that specifically to this bill? Is there any provision in the bill which implies that the Commissioner of Corporations may act entirely arbitrarily along that line?

Mr. BIJUR. No; but it is not provided that he shall not.

Mr. LITTLEFIELD. Your proposition is that the bill is defective because it is open to the Commissioner to exercise this discretion on that point?

Mr. BIJUR. To exercise his arbitrariness. I am not now saying he may exercise a judicial function, but I say this bill leaves it open to him to not use any judgment on any subject. He may simply say, "I do not consider it is reasonable," or "I do not consider it unreasonable," as the case may be, and his reason may be connected with anything. There is no principle laid down. How can we say that this provision which permits an executive officer to make a determination based on no principle laid down is a provision that relates to interstate commerce in any way whatsoever?

Mr. LITTLEFIELD. That is, your proposition is that in so far as the bill does not create any standard, it leaves it in the discretion of the Commissioner of Corporations to create a standard, and he may have a separate standard for every separate case, or no standard?

Mr. BIJUR. He may determine that a contract is not reasonable because it relates to the liquor traffic. Suppose he thought the use of liquor was bad for the people of the United States; he might say that a contract that had some relation to that was unreasonable, generally. No one knows what he might say or think. And since there is no standard laid down, how can Congress say in advance that this is a regulation of anything relating to interstate commerce?

Mr. LITTLEFIELD. Or how can it say in advance that his action is predicated upon anything that has any connection with interstate commerce?

Mr. BIJUR. That is my proposition. Now, assuming that the authority to decide the question of whether the contract is reasonable or unreasonable in restraint of trade is within the power of Congress to grant to the Commissioner, what function will he exercise when that is determined?

Mr. LITTLEFIELD. Now, you come to the question as to whether this power is legislative, executive, or judicial.

Mr. BIJUR. Yes. At first blush I should say that it is judicial because we all have the feeling—all lawyers have, I think—that reasonableness is a question which is either entirely a question for the judge, or it is a question of mixed law and fact as between a judge and a jury, but it is always a thing that appeals to the judiciary and is to be determined by the judiciary.

Mr. LITTLEFIELD. What do you say as to Judge Davenport's definition, that whether an act is judicial or legislative depends upon whether the thing acted upon is a thing that has been done, or a thing that is to be done. I think that is his distinction.

Mr. BIJUR. I do not think he made his distinction quite as broad as that.

Mr. LITTLEFIELD. Yes, he did; just exactly that way.

Mr. DAVENPORT. A thing to operate and intended to operate in the future to control the action of man.

Mr. BIJUR. I am not thinking of that.

Mr. LITTLEFIELD. What do you think of that distinction that he makes that as to whether it is legislative or judicial depends on whether the action of the officer in question is predicated upon a thing that has been done or upon a thing that is to be done? Judge Davenport claims that if it is predicated upon a past act it is judicial in its character, but if it is in futuro in its operation, then it is legislative, and on that point he cites from the case of the Interstate

Commerce Commission *v.* The Railway Company (167 U. S., page 499), which reads as follows:

It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act.

What do you say about that?

Mr. BIJUR. I am not prepared to say without very careful consideration, and I certainly would not want to question Judge Davenport's interpretation of that on that point; but it seems to me that the accent is put on the wrong words. I think the reasonableness of the rates is a judicial question and the amount of the rates is a legislative question. I think that is the distinction.

Mr. DAVENPORT. The precise thought in my mind is this: If a certain thing is done, thereafter no prosecution shall be brought against a person doing certain things. That is manifestly laying down a rule for the future, and I say, modestly, my judgment is that that is a legislative act vested in that Commissioner; that that is its essential nature. It is a rule of future conduct.

Mr. BIJUR. I see it, from that standpoint. That is a consideration that has never occurred to me.

Mr. DAVENPORT. You must everlastingly bear in mind that the construction of this bill is intended to preserve absolutely the comprehensive prohibition of the act against all things, whether reasonable or unreasonable, and the scheme is to provide some means by which a man can get assurance that he will not be prosecuted in the future by the Government, and that assurance is to be procured from the action or nonaction of the Commissioner of Corporations. Necessarily it looks forward, has no bearing at all upon the intrinsic legality or illegality, criminality or noncriminality of the act prohibited, but as Mr. Low put it, it is a sort of amnesty granted by the legislative body.

Mr. LITTLEFIELD. There does not seem to me to be any particular confusion under this language I have just read to you of the court, predicated upon a railroad rate. I understand the language of the court there holds that when it comes to a question of determining whether a rate that has been paid is a reasonable rate, it is a judicial proposition, and when it comes to the question of saying what rate shall be charged hereafter, that is a legislative question. That is what they say. The question here is whether there is any legal analogy, or whether there is not any legal analogy, between the prices to be charged by the corporations affected by this bill and the price for which railroad companies have sold or are selling their transportation. Is there any legal distinction between the two, by virtue of which the proposition laid down here should not apply to the conditions contemplated by this bill, or should not in your judgment apply? Do I make that clear?

Mr. BIJUR. Perfectly clear, but I am not prepared to answer that, because I have never understood that that was the distinction drawn in that maximum-rate case. It may be that it does mean to imply that a past act is a matter of contemplation of judicial cognizance, and a future act of legislative cognizance, but I have always thought that the courts meant to define that the reasonableness of a rate, whether past or future, was a matter for the court, but the amount

of a rate was something that could only be fixed by the legislature. The amount of the rate could not be fixed in the past, but only in the future.

Mr. LITTLEFIELD. Your idea is that the reasonableness was predicated upon the first part of the proposition, and had no connection with the second part?

Mr. BIJUR. Yes, sir. But whether that be so or not, whether the act be legislative or judicial——

Mr. LITTLEFIELD. It may well be that the legislature could fix beyond inquiry what the rate should be so long as it was not confiscatory.

Mr. BIJUR. That is what I was about to state.

Mr. LITTLEFIELD. But whether or not "reasonable" does not apply to both branches of the proposition does not reach that question of whether one is the exercise of the judicial and the other of the legislative power. Do you get my point?

Mr. BIJUR. Perfectly. But what I wanted to say in reference to our present discussion is that, regardless of whether it be legislative or judicial, it can not be submitted to the Commissioner of Corporations. It is one or the other of those, I do not care which, but it is not executive or administrative.

Mr. LITTLEFIELD. Give the reasons for that distinction that are in your mind.

Mr. BIJUR. I do not recall the precise language, but I think it has been quoted by Judge Davenport, and if not it will appear in some of the cases here, but it seems to be perfectly evident, and borne out by all the authorities, that the function of the executive or the administrative arm of the Government is to carry out, to enforce, to execute, the mandates of the legislature.

Mr. LITTLEFIELD. Is not this act a mandate?

Mr. BIJUR. Yes; but where the executive is bound to exercise a judgment or discretion which, I might say, involves a new policy or involves a different or a changed application of the rule established by the legislature, to different states of facts, that becomes legislative in itself. In other words, I contend that while the executive may use judgment and discretion in carrying out the mandates committed to it, and constantly does, it can not of its own accord amend the law, and that I think is in plain terms what this provision amounts to. If the Commissioner of Corporations says "I think that the contract is reasonable," he amends the Sherman law. He amends it; he does not apply it to a state of facts, but he amends the law.

Mr. LITTLEFIELD. What you mean, in substance, is that he makes a law applicable to each particular case as it comes before him. Is that the idea you have in mind?

Mr. BIJUR. Yes; I can put it in so many forms that it would weary you, but I think that the better way of putting it is that he amends this law when he says, "I think this contract is in reasonable restraint of trade," or virtually he does that, when he leaves it unacted upon. He amends the law then. If it is not that, it is assumed that by this bill Congress says, "We have forbidden all restraints of trade. Now, we are going to permit restraints of trade that are reasonable." If they do that, then they are committing to him by this bill a judicial function. The general principle is established that reasonable restraints of trade shall be exempt; they

say unreasonable restraints are forbidden, and reasonable restraints are permitted.

Mr. DAVENPORT. Oh, no.

Mr. BIJUR. And the way they are to be determined, I say, assuming they have said that, is by the Commissioner of Corporations. That is only my assumption—that unreasonable restraints are forbidden and reasonable restraints are allowed. There is only one department under our Constitution which can decide whether that law applies to that trade, and that is the judiciary. The application of that law to the particular case is the function of the judiciary. Do I make myself clear?

Mr. LITTLEFIELD. Yes.

Mr. BIJUR. That is very difficult, I will admit.

Mr. LITTLEFIELD. You do not go quite so far as to reach the proposition that the action of the Commissioner is predicated upon what people are going to do, as distinguished from what they are now doing, because the court has never passed upon the proposition of what may be done; a court necessarily passes upon what has been done.

Mr. BIJUR. The court ought not to, either; he is passing upon a contract made.

Mr. LITTLEFIELD. Yes; he is passing upon a contract made.

Mr. BIJUR. Yes; and that is one of the weaknesses of the bill, because I do not know where it leaves that contract. I am not going into all these points, and take up your time. I see constant difficulty as we analyze along.

Let me take up the point Judge Davenport dwelt upon before. I think I have seen it in a somewhat different light. I refer to the question as to whether this is obnoxious to the fifteenth amendment, and why. If it be true that everyone has a right to contract freely as to interstate commerce, except to the extent Congress may forbid it in the exercise of its power under the interstate commerce clause, then an arbitrary exemption or exception is surely class legislation. There can not be any doubt in my mind, or in the mind of any lawyer, I think, that whether this be a judicial function to be exercised by the Secretary of Commerce and Labor, in which case it would be improperly exercised by him, and therefore not a valid distinction which he might make, or whether it be an arbitrary power which he exercises, in either event we would have persons who make contracts throughout the United States classified arbitrarily into persons who had made contracts which had been approved by the Commissioner of Corporations, and persons who had made contracts that were not approved; and in one case there would be a crime committed, and in the other case no crime. That strikes me as about as bad a classification, without any valid reason, as one can assume to exist. It is much worse than these classifications between railroads and trolley roads through distinctions that have arisen in decisions of the Supreme Court. We have contracts that are wholesome because the Commissioner says they are, although they are in restraint of trade, and contracts that are unwholesome in restraint of trade, simply because the Commissioner says they are unwholesome.

Mr. LITTLEFIELD. What do you say to that phase of the proposition, where they contend that the act makes it possible for everybody to avail themselves of its provisions and get the benefit of its condi-

tions? They claim, I believe, that that relieves it of the criticism that it is confined to any class, or that it confers upon any class any particular privilege, because everybody has the power to avail themselves of it.

Mr. BIJUR. That would not apply to this point.

Mr. DAVENPORT. They exact different conditions of different people doing the same thing. Corporations without capital stock and associations not for profit do not have to do the things to get the immunity which those who happen to have a dollar in the enterprise have to comply with. There is certainly a class distinction there.

Mr. BIJUR. I wish to illustrate the distinction between persons even who register, which is a classification which is obnoxious.

Mr. LITTLEFIELD. You agree with Mr. Davenport?

Mr. BIJUR. Yes, I think he has touched upon the same point. Another illustration, an absurd one. Congress says "A man who steals is guilty of larceny, but a man who steals, and I say it is all right, is not guilty of larceny." Is that a classification that would be permitted? Here we have made the thing a crime in the case of one man, but the other man who does the same thing has not committed a crime, because it says "In my opinion it is not a crime; and I am not a judge applying the law to a state of facts, and I am justified whether I be an executive officer of the Government or anything else." That is no classification; that is an exaggerated form of what this proposes, namely, that the opinion of the Commissioner of Corporations shall determine whether or not a man has committed a certain form of crime. One necessary defect in the operation of the law has some relation to this very discussion, namely, this: If it be possible for a court to decide when a contract is in reasonable and when it is in unreasonable restraint of trade, then I may speak of the result of such a decision as a fact, and I then take two distinctions as granted, namely, contracts that are reasonable and contracts that are unreasonable, as the Supreme Court of the United States might decide them to be. Let us take two men or two corporations that come before the Commissioner of Corporations. Both have the same contract, practically. They present it to the Commissioner. Of the one he says it is reasonable and of the other he says it is unreasonable. As to the one of which he has said it is reasonable, that man is exempt from attack under the Sherman law, unless his contract be unreasonable. The other man has exactly the same form of contract, you will remember, but he has been told by the Commissioner that it is unreasonable. He gets no exemption, yet his contract is reasonable; and there is no way of his ever finding out whether it is reasonable or not, because if he is indicted and tried, the Supreme Court of the United States will merely decide that his contract is in restraint of trade under the Sherman law. I do not see how he is ever to raise the question that he has been treated unjustly. Do you see that?

Mr. LITTLEFIELD. I see it.

Mr. BIJUR. Of course, that is an absurd assumption, but we will assume that two men have exactly the same contract, and to one of them he says it is reasonable and to the other he says that it is unreasonable. The one of whom he predicates reasonableness becomes exempt from the Sherman law unless the contract is unreasonable under the terms of this bill. The other having the same contract, which must therefore be reasonable, has been told by the Commissioner

that it is unreasonable. What does he do? He can not do anything. He can not appeal; there is no way of his bringing that question up, unless, as I understand from the last suggestion made, there is to be an appeal to a court from that determination. But now it seems to me that if that last amendment is to be made, we ought to eliminate the Commissioner of Corporations entirely, because if from the determination of the Commissioner that a contract is reasonable or unreasonable there is to be an appeal to the Supreme Court of the United States, then you might as well say in the bill that reasonable contracts are permitted and unreasonable contracts are forbidden, and let the United States Supreme Court worry about it, right off.

Mr. LITTLEFIELD. Do you think there would be any such parties to a case as would give the Supreme Court of the United States jurisdiction of the appeal?

Mr. BIJUR. This question of the appeal to the court has just arisen to-day, and, with all my boldness, I hesitate to express my opinion of the jurisdiction of a Federal court on a question that has been raised only an hour ago.

Mr. LITTLEFIELD. How is any question of law raised in that case? Can you submit a case to a court on appeal without an issue of fact or law either?

Mr. BIJUR. No; and then, again, you have this question come plainly up, which I suggested in the first place, that if the question was not related to interstate commerce, how would it have anything to do with anything that Congress or the Supreme Court could consider? I can not tell. I am quite unable to answer that.

All this, to my mind, simply illustrates the absolute necessity of a thorough overhauling of this matter before a word is committed to paper in the drafting of a bill of this kind. It has also been suggested that the exercise of this power vested in the Commissioner of Corporations is an exercise of amnesty.

Mr. LITTLEFIELD. On that question of class legislation, let me see if I get your contention. Do you contend that under the provisions of the fifteenth amendment, the due process clause, it is not within the power of Congress to pass any legislation that may be subject to the criticism that it deprives a person of the equal protection of the law?

Mr. BIJUR. I think so; and I think, as I remarked the other day, that the clause out of the Howard case which you have incorporated in your report on the employers' liability bill necessarily imports that.

Mr. LITTLEFIELD. Does that do anything more than simply leave the question open and say that the court has not passed upon it? At the very outside it is no more than obiter dictum. Of course we recognize as dicta expressions of the court that are not necessary to the decision. If in addition to that the court does not pass upon the question at all, it does not reach the dignity of a dictum.

Mr. BIJUR. I do not think that quite reaches the question here. I recall a phrase used, but unfortunately the precise circumstances escape me, where the judge of appeals on the circuit, when a certain point was raised, said:

This point was necessarily involved in the decision of the United States Supreme Court, and it could have so easily have disposed of the whole case if it had decided this point adversely that it is not to be believed that they would have passed a point within their jurisdiction which could have been disposed of in a moment, without giving it any consideration, which would have disposed of the whole case in a moment. Therefore we must assume that they assumed the jurisdiction to lie in them.

That very thing applies here. Let me read this language from the opinion in the Howard case. The court there said they deemed it unnecessary to pass upon the merits of the contention, because the act classified together all common carriers. The court said they did not think it necessary to consider whether or not this arbitrary classification violated the fifth amendment. If they had stopped there I should say the question was open, but they went further.

(Mr. Bijur here quoted further from the case referred to.)

That additional clause, it seems to me, was quite unnecessary and quite meaningless and fairly unintelligible if the Supreme Court of the United States had not thought that the fifth amendment forbade arbitrary classification by Congress.

Mr. LITTLEFIELD. Do you emphasize now the very last expressions that you quoted with reference to cases previously decided?

Mr. BIJUR. Yes.

Mr. LITTLEFIELD. Those cases that were previously decided, I am inclined to think, were of this character, where the State courts had sustained the validity of statutes relating to that subject-matter upon the ground that they were confined by construction to the extra-hazardous features of the employment, and that if not so confined the statute would probably have been held unconstitutional, as depriving citizens of the equal protection of the law. That is the character of most of the decisions that the courts refer to in the margin.

Mr. BIJUR. Not at all.

Mr. LITTLEFIELD. If the amendment has no reference to this classification, why waste time on it?

Mr. BIJUR. They did waste one sentence on it. So that I think there is a fair inference to assume that the Supreme Court of the United States has a pretty strong suspicion that the fifth amendment would forbid arbitrary classifications by Congress.

Mr. LITTLEFIELD. If they took that ground and held that in the Howard case, that would have ended the case.

Mr. BIJUR. They had to decide it on one point or the other. As a matter of fact the arbitrariness of the classification was connected with the reasons on which they decided the case. Those are pretty keen questions.

Mr. LITTLEFIELD. I do not see any connection between the two legal propositions. You may observe it, but to my mind they are absolutely unrelated.

Mr. BIJUR. Assuming that there is no such connection, there is no reason why the Supreme Court should have taken up one branch of that case rather than another; and why, for example, it should have gone into that question of whether that is an arbitrary classification when as a matter of fact they had another ground of equal force and potency, namely, that it was beyond the power of Congress to legislate on intrastate commerce, I do not see. They had to take one ground or the other, but it does seem to me that if the Supreme Court had thought that the fifth amendment had no reference to classification, it need not have made any reference to those cases.

Mr. LITTLEFIELD. At any rate, the remark is entitled to this consideration, that the question was raised and mooted in that case, and that the court distinctly refused to decide it. It left it entirely free for future consideration.



Mr. BIJUR. It did not decide it adversely, and why should you not give the Constitution the benefit of the doubt?

Mr. LITTLEFIELD. Is not the rule of constitutional construction that the court should give the statute the benefit of the doubt? Is not that the rule adopted by the courts when they are taking into consideration an action of the coordinate branch of the Federal Government, that if there is a reasonable doubt they resolve it in favor of the proper exercise of the legislative power? Is not that the general rule?

Mr. BIJUR. Yes, of course; but like so many of these axioms its value depends entirely upon the value of the interpretation. I think that the court would rather err in a case like this in favor of sustaining the full value of the Constitution.

Mr. LITTLEFIELD. They might do it in their minds and hesitate some time before putting that reason on paper, I guess.

Mr. BIJUR. I was about to say that this provision is an exercise of the amnesty power of Congress. That is legislative power. How could that be delegated?

Mr. LITTLEFIELD. Amnesty is a legislative power?

Mr. BIJUR. Amnesty is a Congressional power under the Constitution. Congress possesses power to grant amnesty in coordination with the President's power to pardon after the amnesty is granted.

Mr. LITTLEFIELD. Where do you get the amnesty power on the part of Congress? In the Constitution?

Mr. BIJUR. It is well settled. The case on that is *Brown v. Walker*, 161 U. S.

Mr. LITTLEFIELD. Under what branch of the Constitution is it?

Mr. DAVENPORT. The President of the United States granted the amnesty.

Mr. BIJUR. No—

Mr. LITTLEFIELD. I am not intimating that you may not be entirely right, but I want my recollection refreshed as to the provision of the Constitution to which you refer, the power on the part of Congress to grant amnesty as a legislative power.

Mr. BIJUR. I think, Mr. Chairman, that that case merely deduces it from the general legislative power, which includes the power to declare exemptions from punishment for crimes.

Mr. DAVENPORT. This was a case where they granted amnesty from prosecution where the party gave testimony.

Mr. LITTLEFIELD. Is that the Counselman case?

Mr. DAVENPORT. It is the case of *Brown v. Walker*.

Mr. LITTLEFIELD. Yes, but that is for past acts. This proposition is to give a man immunity for the future.

Mr. BIJUR. Neither Judge Davenport nor yourself will let me make even a tentative assumption in favor of this bill. I am trying to make some progress, to assume that something is valid, or that some of the arguments in favor of it are valid, and so I say it is an exercise of the amnesty power of Congress; and so I say it has some amnesty power; I do not know whether it is absolutely unlimited or not, but it has some. Whether that relates to future offenses I do not know. I am only presenting this point. There is another case, the name of which escapes me, where the very question was raised that I am going to raise here, namely, whether the power could be delegated. That was a case where the question arose whether the Secretary of

the Treasury could remit penalties or fines in connection with the customs regulations. It was held that he might, and that that was not a delegation of the power, but the right to determine the circumstances under which that exemption or amnesty might be granted. It is very finely reasoned. In all events, I assume that Congress has the amnesty power, and I assume that it can be partially delegated, or some functions of it can be exercised by an executive officer. What I would like to know is, if that be all granted, whether there is any precedent for such a wholesale delegation of the amnesty power for past and future—especially future—offenses as is contemplated in this bill? I think the mere statement of it is its own refutation, because without any prerequisite, without even an intimation that merely formal things are to be determined by the executive officer, like administering an oath or determining whether a man had registered in time, but based upon the substantial determination of the entire issue involved, a man is to get amnesty, and that is submitted to an executive officer. It seems to me that, considering it as the exercise of the amnesty power of Congress, it would be less capable of delegation than regarded as any other form of power.

But if I should dilate on all these things, I should never get through, and I will not touch on more than two or three points, and then leave the subject. The other provisions are in regard to the furnishing of information. How does that come within the powers of Congress? What has the furnishing of information of corporations, the complete charts of their operations and financial conditions, to the Commissioner of Corporations, to do with the power of Congress over interstate commerce? I confess I do not see; and it is admitted that those provisions are inserted, in part at least, with the view of compelling publicity as to these matters. How does the giving of publicity to the internal affairs of corporations relate to interstate commerce or the regulation of interstate commerce? I may say, Mr. Chairman, that you will appreciate my reasoning without going into any long discussion, because you are so thoroughly familiar with the reasoning in the Employers' Liability case. I repeat, what possible effect on interstate commerce, the method in which it is carried on or not carried on, or the wisdom of contracts relating to it, or the use or abuse, or the efficiency or nonefficiency of those contracts, what bearing on all those things that are within the power of Congress, has a statement by a corporation of its financial condition, made public or kept private? I do not see it.

Mr. LITTLEFIELD. What do you say about the proposition that the community of officers in the various corporations might be disclosed, tending to establish relations developing contracts and agreements in restraint of interstate trade and commerce? What function of government is this, to be exercised here, anyhow? I suppose it is competent for the Government to ascertain anything illegitimate in contracts or agreements in restraint of interstate trade.

Mr. BLUR. Yes.

Mr. LITTLEFIELD. My suggestion is that this information if disclosed would have a tendency to disclose something of that kind. Suppose two corporations had identity of officers and control.

Mr. BLUR. Under such an exercise of what I will call the interstate power of Congress, Congress could require everybody in the United

States to give information about everything in his family relations and his private affairs; for instance, it might be shown that one man had a bank balance that really belonged to somebody else, and that might have certain consequences. If you went on in that way, where would you land? We would find that everything on earth was within the power of Congress, because it had some power over interstate commerce. This bill contemplates corporations revealing everything in their business in relation to interstate commerce. This is not to be done in the course of a suit or in the preparation of an indictment by a grand jury; it is not done before a legislative committee which is attempting to formulate legislation; it is not done for the purpose of enabling the President to make recommendations to Congress. What is it for? I do not understand. I was brought to that thought by the economic consideration that this revelation of the business of corporations was an invasion of the right of privacy. I think Judge Davenport has gone into that upon other terms, but with the same idea in mind, that that is an invasion of property. Whether it be defined as invasion of the right of privacy, concerning which there has been so much dispute in our State, or whether it be an invasion of the right of every man to do his own business quietly provided he does not interfere with the public interest in some way, I do not know.

Mr. DAVENPORT. That is the case of the *United States v. Boyd*?

Mr. BIJUR. This was a seizure case, where they took papers out of his desk.

Mr. DAVENPORT. No. He did not produce the papers, and they said that it was an extortion from him of information.

Mr. BIJUR. It might be said that this was purely optional under this bill.

Mr. DAVENPORT. Of course this is illuminated a good deal by the case of *Hale v. Henkel*, under the absolute immunity that is given to the agents of the corporation, not to the corporation; but the case of *Hale v. Henkel* is complementary to the case of the *United States v. Boyd*.

Mr. BIJUR. But there was in each of those a criminal proceeding under way.

Mr. DAVENPORT. Certainly.

Mr. BIJUR. Here there is nothing of the kind. You are told to come up to some office and tell all about your business. Now, I do not say that it is not right for the corporation to do it; I do not say anything about the policy. What I say is, even assuming that that be not an invasion of the right of privacy, it is repugnant to the very foundation of our Government as it has existed from the first. Is it within the power of Congress to demand or require such statements except for a purpose directly connected with interstate commerce? What is the purpose here? What have those particular statements to do with the regulation of commerce? The same consideration came up, I think, in the *Adair* case. Both the *Adair* case and the *Employers' Liability* case were full of the consideration of that distinction. Requirements without any bearing on the rules and regulations governing interstate commerce or the principles governing interstate commerce are beyond the power of Congress to impose.

This is not a civil suit for information; it is a requirement that you must give information which comes from a Government that is not

the sovereign, for this is not the State government requiring a corporation to render reports as a prerequisite or a condition subsequent to existence, but this is the Congress of the United States saying to a corporation or individuals, "You must give a great deal of information to the Commissioner of Corporations," and about subjects which could hardly have any relation to interstate commerce, if they tried. Have I made that clear?

Mr. DAVENPORT. In that immediate connection may I quote from the case of *Hale v. Henkel* (201 U. S., p. 71)? That is in regard to the fourth amendment. The court said:

The construction of this amendment was exhaustively considered in the case of *Boyd v. United States* (116 U. S., 616), which was an information in rem against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts. On the trial it became important to show the quantity and value of the glass contained in a number of cases previously imported; and the district judge, under section 5 of the act of June 22, 1874, directed a notice to be given to the claimants, requiring them to produce the invoice of these cases under penalty that the allegations respecting their contents should be taken as confessed. We held (p. 622) "that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be," and that the order in question was an unreasonable search and seizure within that amendment.

The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal (p. 634) "is compelling him to be a witness against himself, within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure—an unreasonable search and seizure—within the fourth amendment."

Mr. BIJUR. The objection can be made much more forcible than I have made it.

Mr. LITTLEFIELD. That is, unless you furnish information, you will be punished criminally, and perhaps it may be said in regard to that that it is an unlawful compulsion so far as the information is concerned, and compels, in an unlawful manner, the disclosing of the information. That is it, is it not?

Mr. BIJUR. Yes, sir.

Mr. LITTLEFIELD. That is what the court says, and your proposition is that this bill produces that result?

Mr. BIJUR. Yes; and has Congress the right to make anybody give information about matters, regardless of whether it will subject him to a criminal prosecution or not?

Mr. LITTLEFIELD. That does not necessarily discriminate as to the character of the information. This, of course, compels the disclosure of any information that the President asks for, irrespective of whether it would subject the party giving it to criminal prosecution or otherwise.

Mr. BIJUR. But the category under which this information would fall is that of information concerning the organization of such corporation, its financial condition, its contracts, and its corporate proceedings.

Mr. LITTLEFIELD. And this bill provides for such other information as the President in his discretion might deem necessary. Nobody can tell what that would be.

Mr. BIJUR. I ask whether Congress has power to require such information, regardless of whether it is going to subject those who give it to criminal prosecution or not?

Mr. DAVENPORT. You will notice in this bill that, while they have to give up everything in the way of information, they are still directly open to prosecution. It is covered by the case of Councilman v. Hitchcock.

Mr. LITTLEFIELD. Which did not go far enough.

Mr. DAVENPORT. Yes; and so they swept the whole thing away.

Mr. BIJUR. There is still the provision as to exemption for past offenses. There are three or four different kinds of corporations—I have forgotten now how many—as to their status toward the Government. There are those which have filed reports and become registered and offered their contracts for examination. I can not undertake to repeat that, because it is not fresh in my mind; but if you will look at the last section of the bill you will see it.

Mr. LITTLEFIELD. What is your suggestion as to the last section?

Mr. BIJUR. The last section is a sort of statute of limitations. Prosecutions can not be initiated against people who have registered, and merely registering and giving this information will exempt corporations from prosecutions for the past.

Mr. DAVENPORT. And persons are not exempted?

Mr. BIJUR. No; and you take two corporations, one of which has been registered and one not—

Mr. DAVENPORT. There is no provision for registration by a person or individual, and yet an individual is to remain exposed to all this trouble, whereas the corporation is exempt. There you have the same classification between corporations and persons. One gets out and the other stays under the same law.

Mr. BIJUR. But what I refer to is the advantage of the statute of limitations; that short statute that is enacted in the fourth section of the proposed bill is limited to corporations which have registered and given this information.

Mr. LITTLEFIELD. Yes; that is by virtue of section 4. In line 23, the limitation for all acts heretofore committed, if they have been in unreasonable restraint of trade, is one year.

Mr. BIJUR. Yes.

Mr. LITTLEFIELD. This reads:

But no corporation or association authorized to register under section eight of the said act approved July second, eighteen hundred and ninety, as amended, shall be entitled to the benefit of this immunity if it shall have failed so to register.

That does not deprive the person of the immunity or the shortening of the statute of limitations in the previous part of the paragraph.

Mr. BIJUR. But does it not make classifications of corporations which have registered?

Mr. LITTLEFIELD. That is another proposition, whether it creates a class that is subject to the prosecution.

Mr. BIJUR. Here is a statute of limitations against prosecution for crime committed in the past, which is made to depend for its efficiency on the doing of some act by the corporation involved, which has no relation at all to that crime. Simply by going and registering and giving a certain amount of information this corporation is exempted after a year from punishment for a crime. Another corporation that does not register does not get that exemption after one year, and yet the filing and registering has no relation to the crime. The propositions are all so related that I thought in covering one I was covering all.

What I wanted to say was that while I do not think it is quite fair to say that because there are doubts as to the constitutionality of a proposed measure, if it is one that is to be much desired, on that account no legislation should take place, and I am not prepared to say that any one of these objections to which I have referred, on the ground of unconstitutionality, is in itself sufficiently forcible to warrant the complete repudiation of this proposed bill; yet, taken altogether, they surely are very persuasive as to the grave difficulty of enacting constitutional legislation along the lines of this proposed bill, and emphasize again the need of a solicitous examination of constitutional law as applied to whatever concrete propositions, business or economic, are embodied in any remedial bill whatever; and it is needless for me to revert to what I said at the outset, that the same is true of the economic propositions contained in the bill, that without clear-cut definitions of the evils and without a clean, clear-cut definition of the method of curing those evils it seems to be impossible to ask reasonable men to pass legislation that is so far-reaching in its effect.

#### ARGUMENT OF MR. DANIEL DAVENPORT—Continued.

Mr. DAVENPORT. I had a case that I wanted to put in the record for the information of gentlemen, but my papers have gotten mixed up and I can not place my hand on it.

Mr. LITTLEFIELD. To what subject does it relate?

Mr. DAVENPORT. Where an application was made for a mandamus to compel, I think it was, the Western Union Telegraph Company to enter into "a proper agreement," or "a reasonable agreement," the court said they could not grant any such decree as that, and it said "What is a reasonable agreement; what is a proper agreement?"

Mr. LITTLEFIELD. In the last analysis that would come down to the question of whether a court could compel a party to contract.

Mr. DAVENPORT. No; the difficulty was about the words "reasonable" and "unreasonable."

Mr. LITTLEFIELD. That is, whether they could compel the meeting of the minds of the parties as to the subject matter as to which they had not met.

Mr. DAVENPORT. It does not come up exactly in that way, Mr. Chairman; but not having the case here now, I will pass that for the present.

We have been talking a great deal here about the Sherman Anti-Trust Act. The opponents of this bill are very much disturbed about the unfortunate condition in which, they say, the people of this country find themselves by reason of that law, as the same has been construed by the courts, and they say they have fears that they may be within its condemnation, and so it has a bad effect upon business, and that has been one of the reasons why Mr. Low, in his character as friend of the people, working in the public interest, should prepare a bill of this kind and urge its passage by Congress. The first thing is, of course, when you propose to amend a law, to find out just what the law is; the second thing is, what is the evil to be remedied; and then, how is it proposed to be remedied, and are the means proposed and the changes in the law proposed, adequate to meet those evils and remedy them. So it becomes of the

utmost importance, it seems to me, at this stage of the discussion of the matter, to see just what has been the interpretation put upon this statute by the Supreme Court, and if these gentlemen are, in their troubles, entirely outside of the purview of that statute, then, of course, this honorable Congress will not change the law for the purpose of laying any ghosts.

It has been talked of here by one person appearing, and another, that they are under the condemnation of the law. For instance, Mr. Gompers has the impression that the labor unions are swept out of existence; that their very existence is imperiled by the construction which has been put upon the law by the Supreme Court of the United States. Mr. Garretson, who represented the Railway Union, said that his men were disturbed about it; and so of business men. I think that the Supreme Court of the United States has effectually disposed of all their fears in the decisions which it has already made. In the first place, you know that they have decided that no contract, combination—or conspiracy, for that matter—comes within the purview of the law unless it is "direct" restraint of interstate trade; that if it falls outside of that, although it may affect interstate trade, it is still not prohibited by the law, and as summing up in a general way what the law does not apply to, I would quote in this connection, that it may appear in the record, from the case of *Hopkins v. The United States*, in 171 U. S., commencing on page 592.

Mr. LITTLEFIELD. Was that the stock-yards case?

Mr. DAVENPORT. It is the case of *Hopkins v. The United States*. That grew out of a combination among people to shut out from dealing with each other certain persons; not to deal with persons that were outside of their association.

Mr. LITTLEFIELD. Was it a stock-yards case?

Mr. DAVENPORT. It was a stock-yards case.

Mr. LITTLEFIELD. That is what I thought.

Mr. DAVENPORT. I quote this as illuminating this general subject:

The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. (*Sands v. Manistee River Improvement Co.*, 123 U. S., 288; *Monongahela Navigation Company v. United States*, 148 U. S., 312, 329, 330; *Kentucky and Indiana Bridge Company v. Louisville, etc., Railroad*, 37 Fed. Rep., 567.)

To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to nonresidents, and such a tax is not one upon interstate commerce, because it affects it only incidentally and remotely, although certainly. (*Ficklen v. Shelby County Taxing District*, 145 U. S., 1.) Many agreements suggest themselves which relate only to facilities furnished commerce or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges, or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would, in our judgment, improperly extend the act to matters which are not of an interstate-commercial nature.

It is a matter of knowledge, through the press, that Mr. Gompers and his associates are to hold mass meetings throughout the country tomorrow and next day for the purpose of insisting upon action exempting them from the operation of this law, because they are prohibited in their vital functions. I want to ask the attention of the committee to what follows:

¶ It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food, and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restrictions of the statute? Suppose the railroad company, which transports the cattle itself, furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the landowners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the States? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act, because horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one State to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination to the cattle yards where sold for less than a minimum sum, come within the statute? Would an agreement among themselves by locomotive engineers, firemen, or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

In our opinion all these queries should be answered in the negative. The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate. (*New York, Lake Erie and Western Railroad v. Pennsylvania*, 158 U. S. 431, 439.)

And there is more to the same effect. In the *Adair* case, the court says there is no possible connection between a labor union, per se, and interstate commerce. Of course the members of labor unions may do those things which interrupt interstate commerce and interfere with interstate commerce, but there is no real—I think it says—or logical connection between them. I have heretofore called the attention of the committee to the fact that the *Erdman* Act passed in 1898, under which this very decision was rendered. The *Adair* case, provides for these things, and in one section of that act it makes a modification of previously existing law, providing for the incorporation of labor unions, which act as you know provides that they may organize and take care of all the various things which they desire to do; so that the apprehension of that section of the proponents in regard to this bill is entirely mistaken. There is nothing in the existing *Sherman* antitrust act as construed by the Supreme Court that in any way whatsoever interferes with the legitimate exer-



cise of the functions of a labor union. I think in one case it is stated that it has no more connection than the church to which they belong, or any other social association. In so far as Mr. Low and his associates and allies in preparing this bill were influenced by fear that there was something in the Sherman antitrust act or in the interpretation thereof by the Supreme Court that interferes with the rights and organization of labor unions, their right to strike for legitimate purposes, their right to refuse to work for anybody even in interstate transportation, let me say that is by the decision of the Supreme Court, which I have just read to you, specifically excepted; and however much misunderstanding and misrepresentation there may be in regard to that, the important fact is, as we all know who are familiar with the matter—and of course that is a matter that would be considered by this committee—that the fear is entirely groundless. The Sherman antitrust act does not and could not constitutionally be made to forbid those things.

Well, but are there not some agreements between business men that are forbidden by the Sherman antitrust act, about which they have reason to be disturbed? Take nine-tenths of those which were referred to by Mr. Towne; they are wholly outside of anything that the Sherman antitrust act touches. There are, however, certain arrangements between business men which are forbidden. Of course they have to be in interstate trade, and they must be direct restraints of interstate trade to be within the Sherman antitrust act, but they are such agreements as in interstate trade look to the suppression of competition between them. The Addyston Pipe case to which Mr. Bijur has referred is one. The case of *Montague and Lowry*, 193 U. S., in California, was another where an association of dealers in unset tiles was formed by which they agreed not to buy of any manufacturer outside of their State who would not join their association, and, in order to join, such a manufacturer had to agree not to sell to anybody except to members of that association, and the members of the association between themselves agreed that they would not sell to any retailer or any dealer in unset tiles outside the association at less than a certain list price, greater than that charged the members. All such agreements, we must concede, when they are in direct restraint of interstate trade, are forbidden by the Sherman antitrust act, and of course it will be a matter of careful consideration by this committee whether or not there should be any relaxation by the United States Government of its grip upon combinations of that character in the mode provided by this bill.

But are there no other agreements covered by the Sherman Act? I want now to direct your attention to a very remarkable result of the decisions of the Supreme Court of the United States. When we get back to the *Trans-Missouri Traffic Association* case, in 166 U. S., you will remember that the dissenting opinion by Mr. Justice White, concurred in by his fellow dissenters, was based entirely upon the fact that certain agreements in restraint of trade at common law were lawful, and the sweeping language of the opinion of the majority brought those within the condemnation of the Sherman law, and therefore they urged that that was an unreasonable construction of the statute, that it could not have been the intent of Congress to have forbidden them. If you examine closely, however, the opinion of the majority, they say in effect that the very things that the

dissenters were adducing were matters that were not in restraint of trade properly understood.

Mr. LITTLEFIELD. That is the authority upon which the dissenters relied?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. Were cases that did not involve restraints of trade?

Mr. DAVENPORT. Restraints of trade in the proper sense of the term. Mr. Justice White elaborated upon that to the contrary in his dissenting opinion, and so it was left. The next time the question came up before the Supreme Court, in 171 U. S., the same arguments were urged upon the court, and the majority still stood firm as to the illegality and unlawfulness of the alleged combination.

Mr. LITTLEFIELD. That was the case of the Joint Traffic Association.

Mr. DAVENPORT. The Joint Traffic Association, in 171 U. S.; but if you will remember, in the decision in the Northern Securities case, in 193 U. S., Mr. Justice Brewer made a very significant statement. While he concurred with the majority, he said:

I can not assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States v. Freight Association* (166 U. S., 290), followed by the cases of *United States v. Joint Traffic Association* (171 U. S., 505), *Addyston Pipe and Steel Company v. United States* (175 U. S., 211), and *Montague & Co. v. Lowry* (193 U. S., 38), decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments can not be sustained. Instead of holding that the antitrust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition which prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. Whenever a departure from common-law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended.

It should be remembered in this connection that all agreements between public-utility corporations to maintain rates were always unlawful at common law.

In the case of the *Cincinnati Packet Company v. Bay* (200 U. S., 184) this very question arose, which was as to the Sherman Act condemning such agreements as were permitted by the common law in the classes that you speak of. The material point was that the Packet Company had sold out their business and "agreed as a part of the consideration of this agreement that for five years the parties of the first part, or either of them, shall not be engaged in running or in operating or in any way be interested in any freight and passenger packet or business, or either of them, at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points," and the intermediate points were points in another State.

Mr. LITTLEFIELD. That was a case where they are contracting themselves out of trade?

Mr. DAVENPORT. Yes; they first said that this was a technicality, at most, this touching at points in the other States. The court said, at page 184:

But we do not like to put our decision upon technical reasoning where there is at least a fair surmise that such reasoning does not meet the realities of the case. We will suppose, then, that the contract does not leave commerce among the States untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract, and, so far as it is so, is shown to be valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to do with commerce among the States. That which suspends payment of installments in case of very serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

It is argued, to be sure, that the last-mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words "it is also agreed as a part of the consideration of this agreement." By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone, but for the vessels with the covenant. So, still more clearly, the parallel installments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale. Presumably all that there was to sell, beside certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from anyone, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute, *United States v. Trans-Missouri Freight Association* (166 U. S., 290, 329), *United States v. Joint Traffic Association* (171 U. S., 505, 568), and it was so decided in the case of a patent. (*Bement v. National Harrow Co.*, 186 U. S., 70, 92.) It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the State line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed.

Mr. LITTLEFIELD. That is precisely in line with the common-law distinction, as I catch it.

Mr. DAVENPORT. Yes. And when you go back to the majority opinion at that point (166 U. S., 329), you will see that they say that such contracts were not, in the true sense of the word, in restraint of trade, and therefore that the use that was attempted to be made of them by the dissenting judges was an unfair use, and that it was not adapted to the point to be determined.

Mr. BIJUR. Very much to the same effect is the case of the *Diamond Match Co. v. Rober*, 106 N. Y., where it was held that the limitation that they would not do business practically throughout the United States was not a contract in restraint of trade when connected with the good will of the business. Our court of appeals went very far in that direction.

As I must leave now, Mr. Chairman, may I say that I appreciate very much the courtesy of Judge Davenport in giving way that I might be heard.

Mr. DAVENPORT. So, before these gentlemen proceed to take the underpinning out from under the Sherman antitrust act and destroy its provisions by this reckless innovation, they ought to com-

ply at least with the suggestions of Mr. Bijur and Judge Cowan, that they come up before the lawmaking body and designate what evils they are suffering from. In ninety-nine cases out of a hundred it will be found that they are as free from the inhibitions of the Sherman antitrust act as they are from the laws of Canada. They are not within the scope or purview of it. Their fears are fanciful.

Mr. LITTLEFIELD. Is not the Knight case, where they controlled 90 per cent of the product and still were not engaged in interstate commerce, very suggestive?

Mr. DAVENPORT. Yes. It is a very difficult thing to find an agreement, a contract, a combination, or a conspiracy in restraint of interstate trade when you come to point your gun at it with the object of killing it.

Mr. LITTLEFIELD. And to prepare the legal evidence.

Mr. DAVENPORT. And prepare the complaint.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. Of course, in drawing the complaint in the Hatter's case, we had all the facts there to bring it within the law, but local boycotts, boycotts within a State, even, you could not bring in. It was only because the gentlemen had conspired against interstate trade, by their own admissions. The allegations in the indictment were based on boasts made of what they had accomplished, they furnishing the proof against themselves.

Mr. LITTLEFIELD. That is what tied them to the interstate commerce proposition.

Mr. DAVENPORT. Yes; certainly; and the gentlemen on the other side made a very elaborate attempt to show that really there was not any interstate combination about it, although by the allegations in the complaint they had by their demurrer admitted that there was.

Mr. LITTLEFIELD. They did that so effectively that the court below held against you.

Mr. DAVENPORT. The court below, the lowest court, said "I do not know whether this Sherman law applies or not, but if we go ahead and try these allegations and ultimately it is found that it does not apply, we will have all this expense and trouble of a trial for nothing, and therefore we will cut the Gordian knot by sustaining the demurrer," much to the disgust, I thought, of the learned gentleman who had put in the demurrer; but when the court sustained that demurrer I knew we had them, because it enabled us to go to the circuit court of appeals on the proposition, and if they decided against us there, we could go up by writ of error, or the court could certify the matter up, which ultimately they decided to do, so that the matter would be set at rest.

Mr. LITTLEFIELD. Then the ruling of the court below was really pro forma?

Mr. DAVENPORT. Yes; as an examination of the record of the case that was handed up to the Supreme Court will show. That court reached down and brought the whole case up and that record shows that that was the view the lower court took of the matter, that the public interest and the interests of all parties and all hands would be served by getting information on the law of the case before we went to a trial on the facts. So I must confess that sitting here and listening to the instances that have been extracted from witnesses by the pertinacity of the questioning of the chairman, I think they have failed

to disclose anything which could be discerned which could be found to bring a person within the Sherman antitrust act, except these agreements to control prices and stifle competition entered into by the parties which were unlawful, or which were void at common law. We should keep clearly in our minds the distinction between the invalidity of contracts made in restraint of trade at common law, which were simply void, and illegal, unlawful contracts or combinations, which are quite another thing, as Mr. Justice Holmes points out in his dissenting opinion in the Northern Securities case.

Mr. STEBBINS. That last decision which you speak of sums up the whole matter, does it not; and can you not formulate a standard for Mr. Towne that he can apply in all cases, to determine whether any of these agreements he has in mind are unlawful or not? Is not the whole matter summed up there?

Mr. DAVENPORT. By exception.

Mr. STEBBINS. No, by the statement that they make, that the main purpose of the contract or agreement must be to restrain interstate trade.

Mr. DAVENPORT. That is the law already, the Supreme Court says. What is the use of this committee going to work and recommending to the House a bill to accomplish a thing which is already exempted by the nature of the act? I am quite sure that the chairman of this committee and his associates would advise Mr. Towne and his friends to go and pay a few dollars and hire a lawyer to look at these decisions and just see whether or not the things that they want are forbidden by the act. The things that they want that they ought not to have perhaps ought to stay under the law without any change.

Mr. STEBBINS. I called attention the other day to Mr. Justice Brewer's decision in the Northern Securities case.

Mr. DAVENPORT. I have just read it.

Mr. STEBBINS. He referred to the matter of reasonableness. As a matter of fact, "reasonable" is an adjective. The real test is whether the contract or combination has for its purpose a restraint of interstate commerce. If it does, then they say it is unreasonable. As to the reasonableness or unreasonableness, they do not care at all.

Mr. DAVENPORT. No; they say if it is in restraint of trade. The inquiry is, is it in restraint of trade? Everything that looks like restraint of trade they say is not restraint of trade; but the point I make is that you would not accomplish anything by changing the existing law so far as it relates to these things that they are disturbed about. What I say is that a very little effort on the part of their legal advisers, an examination of these decisions, would dispel their fears as to the things which the court says are forbidden, and which it would probably be unwise to permit them to do, all things considered. On that point we all know that you can not enact a single statute that will not affect some case in which it would be harmless and perhaps beneficial, if it was not included within the law. Take, for instance, the statute of frauds, which requires certain agreements to be in writing. Everybody knows that in particular instances that works a hardship. Take the statute of wills. In some instances, no doubt, injustice has been done.

Mr. LITTLEFIELD. And the intention of the testator has been absolutely defeated.

Mr. DAVENPORT. Yes. Yet the great public benefits from the existence of those statutes are sufficient to warrant their retention on the statute books unchanged, and it is all summed up in this case.

Mr. LITTLEFIELD. The same thing applies to the doctrine of *stare decisis*.

Mr. STEBBINS. The point I wanted to make there is this, that the question of reasonableness or unreasonableness is not the criterion.

Mr. DAVENPORT. Under the Sherman antitrust act?

Mr. STEBBINS. Of the legality or illegality.

Mr. DAVENPORT. Did I not make that out?

Mr. STEBBINS. Yes; I think you did.

Mr. DAVENPORT. And somewhere, I think it is in the majority opinion in the Trans-Missouri case, they say that the emphasis is to be laid on whether it is restraint of trade; and when you say "restraint of trade," in the first place, it is direct, and in the next place, things such as we have described, like sales of a business with an agreement not to enter into it within a certain space or within a certain time, are not in restraint of trade. I think you will find that.

Mr. STEBBINS. I do not think you understand me. What I meant to say was this, that when a case arises the court inquires, "Is it the purpose and intent of this contract or agreement that it shall restrain trade?" If they find that it is the main purpose, then they say it is unreasonable. If it is only incidental to something else, as in that case which you read, that is, the selling out of a business and agreeing to keep out of it for a certain number of years or something of that kind, they say the main purpose of that contract is not to restrain trade. Then they say that it is a reasonable contract, and it seems to me that that distinction runs through all the decisions without an exception, and that is what the Supreme Court has followed in all of its decisions. What I wanted to say was that in that Northern Securities case, when Justice Brewer applied the test of reasonableness or unreasonableness, it was not the thing he had in his mind at all, but it was an adjective which he applied to a certain state of facts. The state of facts was that there was a contract in restraint of trade.

Mr. DAVENPORT. Yes; I think perhaps in that opinion somewhere the court says the question is whether it restrained trade; not actually, but whether it does it within the legal definition of restraint of trade.

Mr. LITTLEFIELD. As to the question of reasonableness or unreasonableness upon restraints of trade at common law, the decisions of the courts have almost universally been predicated upon a state of facts which involved the question as to whether or not a party contracting himself out of trade contracted himself out of all places and during all time, and contracts of that sort have always been held unreasonable as being in restraint of trade. Contracts that are unlimited as to space and limited as to time have frequently been held reasonable, and those unlimited as to time and limited as to space have also been held reasonable. Those are the conditions under which the courts at common law have used the terms "reasonable" and "unreasonable." They have not predicated their decisions upon any other class of cases.

Mr. STEBBINS. I think they have. What I had in mind was whether the purpose or intent is to restrain trade or whether it is incidental to some other legitimate purpose.

Mr. LITTLEFIELD. I have a list of 75 or 100 cases which will sustain this.

Mr. DAVENPORT. Does it not follow necessarily that that is what is meant by the act, and the insertion of the word "reasonable" or "unreasonable" is of no benefit whatever?

Mr. STEBBINS. None whatever, because it is an adjective that is applied to a state of facts and it is not applied as a test.

Mr. LITTLEFIELD. Then what becomes of your proposition that the effect of the word "unreasonable" destroys the act, on the ground of the uncertainty of the whole proposition.

Mr. DAVENPORT. Because when you put that term in there, and say that it shall be in unreasonable restraint of trade, you find yourself on a sea without chart or compass.

Mr. STEBBINS. All up in the air.

Mr. DAVENPORT. All up in the air, as the gentleman says.

Mr. LITTLEFIELD. It does have the effect in that case?

Mr. DAVENPORT. It destroys the act.

Mr. LITTLEFIELD. Yes; but that is pretty hard to reconcile with the proposition which was just stated, that it does not have any effect.

Mr. DAVENPORT. If I so stated it, I did not mean it in that sense, of course.

Mr. LITTLEFIELD. That is what I was anxious to ascertain.

Mr. DAVENPORT. This discussion has led to the expression of some views here about competition, and has raised the question whether or not some restriction of competition would not be good policy. Mr. Low apparently considers that we have outgrown the necessity for preserving the law as it exists, to prevent restraint, by combination, on free competition. I thought I would direct the attention of the committee to the operation of competition. Anything that has been mentioned here as to its advantages and disadvantages has been but a partial view of the function of competition in the industrial world. Competition not only acts as the great stimulant, but it is the sovereign regulator of the industrial world, and it does something that can not be done by man. As the writers who have considered the matter say, it is a part of the providential order of things. I have here a short article by Charles Coquelin, an eminent French publicist, now become quite rare, which I would like inserted in the record.

Mr. LITTLEFIELD. The article has become rare, or the publicist rare?

Mr. DAVENPORT. Both.

Mr. STEBBINS. That can be found complete in the Encyclopedia of Lalor.

Mr. DAVENPORT. That is where I took it from. It is like asking a man to hunt for a needle in a haystack to get it, and I think if it is put in the record, and Mr. Towne and all these other gentlemen will read it, they will recognize that competition is an indispensable thing to preserve, and that the thing which Mr. Gary is doing here under the idea that he is a great public benefactor—

Mr. LITTLEFIELD. In that benignant way.

Mr. DAVENPORT. Yes; in his benignant way, is really a deadly attack upon the interests of everybody. It might, perhaps, be concretely illustrated by his announcement that the gentlemen who wanted lower prices must be content, because while it might be for their advantage, yet it was for the greater advantage to keep the thing as he dictates it, and, as Mr. Stebbins has said, I think it would be very useful to the statesmen who have to pass upon this matter if this article was incorporated in the record. It is quite short. I think, without further attempt to take excerpts from it, I would ask that it be incorporated in the record of the hearings.

Mr. LITTLEFIELD. From what do you get it?

Mr. DAVENPORT. I have taken it from the "Encyclopedia of Political Information," by Lalor.

Mr. STEBBINS. I may remark that there is another article there that is equally valuable, on "association" and "associations." The last part of it treats of the same subject, the benefits of competition.

Mr. LITTLEFIELD. I am very glad to have in the record anything that is reasonably material. I do not want to lumber it up too much.

Mr. DAVENPORT. This is entirely applicable, and pointed, and convincing, and a person who thinks he has mastered the subject of the effects of competition when he has said that it is to be determined only by its effects upon the price in the particular instance, has but a very partial view of the function which competition has in the industrial world. Of course some things are very apparent. For instance, if a lot of people are competing and they have all combined together, their inducement to improve their works and products, etc., is taken away, and the inducement that they would have to get business by cutting down, lowering the prices, etc., is taken away; but that only touches the edge of the matter, and all people who combine together for the purpose of restricting competition are very much self-deceived if they think that they are conferring a benefit upon the public.

(The document referred to by Mr. Davenport is appended to this hearing.)

Mr. DAVENPORT. While we are cleaning up the things on the outside, before we tackle the particular provisions of this bill and point out their manifold monstrous absurdities, I want to talk a little while upon a subject which was suggested in a colloquy between the chairman of this committee and myself the other day, as to the effect upon the rights of people who are boycotted, if Congress should legalize interstate boycotts. As I understand the suggestion of the chairman it was that Congress might legalize interstate boycotts, assuming that to be the effect of this bill, and that still the party whose business was affected could bring a suit at common law for the injury to his business, and recover damages for the acts done which were rendered legal by act of Congress; that he would still have his common law remedy, and that he would not be interfered with or be disturbed at all, but he could go into the State court and sue and recover, and that he need not pay any attention to the fact that Congress had stepped in and legalized the acts. I must say that I dissent from that position, and that my understanding is precisely the reverse.

Mr. LITTLEFIELD. That is not exactly the proposition. The proposition is, if Congress failed to prohibit an interstate boycott.

Mr. DAVENPORT. That is another proposition entirely.



Mr. LITTLEFIELD. That is the proposition that the chairman had in his mind.

Mr. DAVENPORT. If the chairman had that proposition in his mind, that is one that I would not dispute.

Mr. LITTLEFIELD. The only proposition pending here is to exempt. Of course it is an inaccurate use of language to say that we might authorize or legalize, but, popularly speaking, where you do not prohibit on the one hand you are assumed to have authorized on the other.

Mr. DAVENPORT. That only puts the discussion one step farther back, because it is manifest that Congress, having regulated the subject, and having declared that certain things should not be illegal, has covered the ground.

Mr. LITTLEFIELD. The first question is, how does the action of Congress under the commerce clause either add to or subtract from the rights of action of the individual?

Mr. DAVENPORT. The power to regulate commerce is plenary and exclusive in Congress, and the regulation of commerce consists in declaring, not only that certain things may be done, but that certain other things may be left undone. The whole is one system. I am assuming that the true construction that the courts would put upon this act, which I think is necessarily true, would be that, while all combinations in restraint of trade were prohibited except these, it would be that, as to those that were prohibited, those that were excepted were permitted.

Mr. LITTLEFIELD. Is that on the theory that when Congress fails to act it is equivalent to a declaration of its approval?

Mr. DAVENPORT. No; when they undertake to regulate a whole subject and forbid part of it, and exempt and except part, that is the declaration of the will of Congress, that those that are excepted are permitted. It is a part of the system of regulation. Of course that was the proposition in the case of *Gibbons v. Ogden*, and that was Mr. Webster's contention, that when Congress regulated a thing and said it should be thus and so, it was equivalent to a declaration that anything else was not permitted; that it covered the whole field and that it was a part of the system; and Chief Justice Marshall, in giving the opinion of the court, said that the argument addressed in support of the proposition by those who advanced it, in their judgment had not been answered; but they passed on to another question. Justice Johnson, who concurred in the decision, however, advanced squarely to and took that ground, and that position has been followed by the Supreme Court in repeated cases, and I have them here. That is the proposition. There is, of course, no Federal common law.

Mr. LITTLEFIELD. Is that really an accurate statement of it?

Mr. DAVENPORT. What?

Mr. LITTLEFIELD. That there is no Federal common law.

Mr. DAVENPORT. Before I completed the statement you asked me the question, "Is that an accurate statement of it?" There is no such thing as a body of Federal common law in the same sense that there is a body of Federal statute law, but there is a common law in each of the States, and certain principles which are thus common and general to them all are applied by the courts, the Federal courts, in determining matters pertaining to interstate commerce,

in the absence of Congressional regulation. That is the point decided in the case of *Call v. The Western Union Telegraph Company*, 181 U. S. I do not now recall the precise number of the report in which that case is found. But there is no Federal common law as relating to interstate commerce. The distinction perhaps may seem to be one without a difference, but still it is made. The courts have attempted to adhere to their statement that there is no Federal common law, and at the same time to take a step by which they apply the common law of the States, the general principles of the common law, to matters of interstate commerce.

Mr. LITTLEFIELD. There are no Federal common law criminal offenses.

Mr. DAVENPORT. No; that is true.

Mr. LITTLEFIELD. That distinction is very clear there.

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. But I suppose that in the administration of justice in the Federal courts, either on the criminal law or on the Federal side, the court is governed in its conclusions and determinations by common-law principles.

Mr. DAVENPORT. That is to say, in the interpretation of the crime described, they resort to the common law for the definition.

Mr. LITTLEFIELD. Yes; and also in giving civil relief they resort to the common law.

Mr. DAVENPORT. Yes. But of course as a substantive body of law covering the United States in the same sense that the statutes of the United States cover the United States, there is no such common law.

Mr. LITTLEFIELD. Does the distinction appear very clearly in any branch of the law outside of the criminal branch?

Mr. DAVENPORT. Oh, yes; there are repeated decisions. If I had not mislaid my collection of authorities, I would be able to refer you to the cases.

Mr. LITTLEFIELD. I do not suppose you can assert common-law rights on the civil side of the court, in a Federal court?

Mr. DAVENPORT. Certainly you can; that is to say, when the court has jurisdiction of the controversy between the parties.

Mr. LITTLEFIELD. Then the common-law principles apply?

Mr. DAVENPORT. Certainly. They apply in all the States. The Federal court, while it is an independent court, is yet a court of that State, in that sense. This is the point. Take the *Loewe* case. Mr. Loewe was engaged in business in Danbury, Conn. His whole business, so far as sales were concerned, was with wholesalers in other States. The common law and the Sherman antitrust act both forbade and made unlawful the acts which resulted in injury to him and for which he brought suit in the Federal court. We also brought suit in the State court to make sure that we were not in the wrong tribunal when we resorted to the Federal court.

Mr. LITTLEFIELD. Suppose you just call it a boycott. The boycott was unlawful at common law and it was also unlawful by virtue of specific provisions of the Sherman antitrust act.

Mr. DAVENPORT. Let me define it.

Mr. LITTLEFIELD. Very well.

Mr. DAVENPORT. You remember that Mr. Webster in his debate with Mr. Calhoun said that words were things, and things of mighty

influence, not only in appeals to the passions, and so forth, but in legal discussions also. Now, do not take refuge under that vague term "boycott." The act of combining to prevent the customers of Mr. Loewe in other States from buying of Mr. Loewe, and to prevent Mr. Loewe from selling to those customers, was an act which was forbidden by the statutes of the United States.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. If there had been no such statutes of the United States, those very acts would have been unlawful at common law. In drawing the complaint and determining to what tribunal I would resort, the question arose, could I bring that suit in the State court when Congress had acted and forbidden it, and had provided a remedy under the Sherman antitrust act.

Mr. LITTLEFIELD. That raised the precise question as to whether the remedy was exclusive of the Sherman antitrust act.

Mr. DAVENPORT. Yes; and the authorities revealed the fact that I could go into the State court and recover civil damages for the wrong sustained under the Federal law.

Mr. LITTLEFIELD. Yes. You could assert in the common law State court the rights conferred upon your client by the Sherman antitrust act.

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. And get a remedy under that statute in your State court.

Mr. DAVENPORT. I could get single damages. You know the way it would be determined by our State law, it being an action at law under a general statute of the United States. In a common-law action, when the jury renders its verdict for the damages, whatever they are, the court, of course, multiplies by three, and the law of our State permits treble damages; so I could have gone into the State court under the decisions of the Supreme Court of the United States and sought my remedy under the seventh section of the Sherman act. I also, I say, could have gone into the State court and have enjoined them from doing the things that are forbidden by the Sherman antitrust act, because the jurisdictions of the two courts are concurrent and are not made exclusive by the act of Congress. When we had that situation, the road was clear.

Mr. LITTLEFIELD. Did you find any authorities that prohibited you from proceeding on your common-law rights against these defendants on the same state of facts?

Mr. DAVENPORT. No authorities other than the gentlemen on the other side of the case, for as soon as I got these two cases, the one into the State court and the one into the Federal court, besides attempting to get both thrown out of court on the ground that one action abated the other, they came into the State court and said "The gentleman claims that this thing is covered by the Federal statute, and you can not seek a remedy here for these wrongs that are covered by the Federal statute; that is exclusive."

Mr. LITTLEFIELD. I thought your action in the State court sounded on the Federal statute.

Mr. DAVENPORT. It set up the facts which brought it within the Federal statute. Of course we have in our State a union of equity and law in the same court, and I asked for equitable relief as well as

for damages; but I did not nerve myself up then to the position of claiming that I could get treble damages; but an investigation of the matter afterwards satisfied me I could get treble damages.

Mr. LITTLEFIELD. Did your declaration on its face disclose the fact that you were relying upon the provisions of the Sherman antitrust act in a State court?

Mr. DAVENPORT. It set up the fact that these acts were forbidden by the Sherman antitrust act.

Mr. LITTLEFIELD. And that you relied upon that act? Did your declaration disclose that you relied upon the Sherman antitrust act as the basis of your recovery?

Mr. DAVENPORT. Not particularly, but the facts were set up, and it was alleged that the acts were unlawful under the Sherman antitrust act. The gentlemen on the other side came into the court and said, "The State court has no jurisdiction of this matter." Thereupon, of course, I opposed that proposition, and the State court said, "Well, on any theory of the case I do not see why, on this state of facts, the State court has not jurisdiction of the matter," and so the objection was overruled; so those astute gentlemen undertook to claim that Congress having regulated this matter, and having provided the tribunal in which the suit could be brought, the matter was outside of the jurisdiction of the State court.

Mr. LITTLEFIELD. That is, it ousted the State court of its jurisdiction?

Mr. DAVENPORT. Yes. They not only pleaded in abatement in the State court the action in the Federal court, but they went into the Federal court and pleaded in abatement the action in the State court, and Judge Platt said "this matter is exclusively within the jurisdiction of the Federal court," and therefore the State court could not take jurisdiction of it. Well, that is about the position it remained in until they demurred to the complaint in the Federal court, and the avenue was opened to us to get it up to the Supreme Court and get the law declared as it was declared.

Now, suppose Congress had enacted a law that combinations in restraint of trade of the character described in that complaint are lawful. Congress has the plenary and exclusive control over the matter. I say that the very acts which were relied upon as unlawful, which resulted in injury to us, would have been lawful, made so by the body in whom the full control and power is vested to say whether they were lawful or not.

Mr. LITTLEFIELD. In that case, then, you counted on specific interstate acts?

Mr. DAVENPORT. I had to describe them. You can not bring a civil action for a conspiracy without you set out the acts and the facts.

Mr. LITTLEFIELD. But suppose you had a conspiracy in the State, intra, as a part of which you had your interstate commerce conspiracy?

Mr. DAVENPORT. If Congress said that everything that was done by those people between his customers and himself in interstate business was lawful, he would have been shut out of that; and I say inasmuch as he only sold \$10,000 worth of goods in Connecticut and \$400,000 worth in the other States, that was all shut out.

This was the point that I made, that the distinguished gentlemen, whoever they are, who drew this bill, have, in effect, if it should be

adopted as proposed, legalized those acts; and if they did, I most respectfully suggest that what I understood the chairman to say, that we would still have our remedy at common law for the injuries we have received notwithstanding the adoption of this law, I can not concur in.

Mr. LITTLEFIELD. That proceeds upon the assumption that the exemption of these people from the operation of the law is equivalent to a legal authorization.

Mr. DAVENPORT. Yes. Now, I fall right back again there on the proposition laid down in *Gibbons v. Ogden* and the other cases.

Mr. LITTLEFIELD. Do you understand that *Gibbons v. Ogden* goes as far as that?

Mr. DAVENPORT. Certainly; that was Mr. Webster's contention.

Mr. LITTLEFIELD. It may have been Mr. Webster's contention.

Mr. DAVENPORT. Not only that, but the judges have said so, and they have come up fair and square to the proposition.

Mr. LITTLEFIELD. *Gibbons v. Ogden* is in 4th Wheaton?

Mr. DAVENPORT. Yes; and around along about 120 U. S. somewhere is another case right squarely in point, where the cases are all considered. It is within the last fifty or sixty volumes.

Mr. LITTLEFIELD. Between now and the next hearing suppose you get that case.

Mr. DAVENPORT. Very well.

Mr. STEBBINS. Was not that matter discussed in the Senate when the bill was up?

Mr. DAVENPORT. Yes.

Mr. STEBBINS. As to the common-law right.

Mr. DAVENPORT. Everything was discussed about it. That leads me to remark that even the President of the United States is mistaken when he criticises the Sherman antitrust act as a crude performance; "the worst kind of a law," I think he calls it in his message to Congress. I think he speaks of it as an example of hasty legislation, and all that. There is not a piece of legislation on the statute books of this or any other country that was more carefully prepared, or the scheme of which reveals a better comprehension of all the difficulties in the way; thoughtfully, learnedly adopted and considered; and the result is the product of the very highest legislative intelligence. There has not anything new been pointed out or brought to light here. These various objections made by Mr. Towne and others were all urged by Senator Platt of my State against the Sherman law when it was pending. "You will hurt more people than you will do good to by passing such a law as this," he said; and I believe that Mr. Platt was the only Senator who finally voted against it.

Mr. LITTLEFIELD. Yes. But while you are on that part of it, give me your idea of the legal distinction between a contract in restraint of trade and a conspiracy in restraint of trade; then, when you get through with that, give me the distinction between a combination in restraint of trade and a conspiracy in restraint of trade.

Mr. DAVENPORT. When we were arguing that before the Supreme Court of the United States, I adverted to that distinction. Mr. Justice Holmes, in his dissenting opinion in the Northern Securities case, had this to say.

Mr. LITTLEFIELD. Among other fine distinctions he discovered is the one you are going to refer to.

Mr. Davenport. He said:

The first section makes "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations" a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two—contracts in restraint of trade and combinations or conspiracies in restraint of trade, and we have to consider what these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business (although in some cases carrying on a similar one), which, wholly or partially, restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. (*Mitchel v. Reynolds*, 1 P. Wms. 181.) Of course, this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition.

The suggestion has been made here that every partnership is in restraint of trade. The court continues:

Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combinations or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized, or attempted to monopolize, some portion of the trade or commerce of the realm. (*See United States v. E. C. Knight Co.*, 156 U. S., 1.)

Mr. LITTLEFIELD. Perhaps I have not got it in my mind clearly, but where does he raise the distinction between a combination and a conspiracy?

Mr. DAVENPORT. I do not think he does. Every conspiracy embraces a combination. I think one includes the other; that is, a conspiracy includes a combination.

Mr. LITTLEFIELD. Well, I agree with you more or less as to the accuracy with which the act is drawn. It is subject to criticism as having more or less tautology in its language.

Mr. DAVENPORT. When you say that a conspiracy involves a combination, that is, that there is a combination involved in a conspiracy, nevertheless there might be combinations that were not conspiracies.

Mr. LITTLEFIELD. A conspiracy is nothing more than an agreement or combination between two or more persons to do an unlawful thing.

Mr. DAVENPORT. Or to do a lawful thing by unlawful means; but combinations can be made that are not such agreements.

Mr. LITTLEFIELD. Can you think of a combination that is not an agreement between two or more people?

Mr. DAVENPORT. Certainly not.

Mr. LITTLEFIELD. A combination in restraint of trade is a combination between two or more people to do an unlawful thing, because the law makes it so.

Mr. DAVENPORT. Because the law makes it so.

Mr. LITTLEFIELD. Yes, of course.

Mr. DAVENPORT. The case of *Steamship Co. v. McGregor* is one of the cases they were aiming at in the Sherman Act.

Mr. LITTLEFIELD. They refused to employ common agents?

Mr. DAVENPORT. Yes; and they resorted to brutal methods of competition. It went all the way up to the House of Lords, and every judge that passed upon it concurred in the same opinion, that the combination was not illegal at common law, except the master of the rolls, who took a different view of it. I think that was Lord Esher, although I do not recollect certainly. The court said, "These people have combined to crush this rival by driving him out of business through competition with a view to getting the business and monopolizing it. He has brought suit here against them for a conspiracy. There is a combination, and there is a combination, to monopolize the business and to use means cruel, morally wrong, perhaps, but still it is all within the exercise of their rights." And the court said that such a combination as that was not a conspiracy under the law of England, and that it was not forbidden in the sense of being illegal, although, perhaps, if one of the parties fell out with his fellow-malefactors—as it is fashionable to call them now days—the courts would not enforce such a combination as that, one against another, but that there was nothing illegal in that.

Mr. LITTLEFIELD. Did they not hold in that case that the purpose sought to be obtained was a legal purpose?

Mr. DAVENPORT. They did.

Mr. LITTLEFIELD. Was not that the touchstone as to the question of conspiracy?

Mr. DAVENPORT. Not only that, but the means were not illegal.

Mr. LITTLEFIELD. And they held that the purpose was legal?

Mr. DAVENPORT. It was a combination in restraint of trade.

Mr. LITTLEFIELD. The court did not quite use that language.

Mr. DAVENPORT. Oh, they did.

Mr. LITTLEFIELD. Did they?

Mr. DAVENPORT. Repeatedly, all the way through, in 15 Queen's Bench Division and in 23d, and in the appeals cases for 1892, and that is the precise point in it, that here is a combination to monopolize trade, to crush a rival, not by fraud, they say, or by violence, or by anything like that, but by the use of competition, and it was for the purpose of getting a monopoly. That combination was lawful at common law, if we can take the definition of the highest court in Great Britain, and it was that kind of a thing that the Congress of the United States aimed to prohibit in certain of the provisions of this law in the second section, because they not only say that combinations for that purpose, but that individual persons could do the same thing.

Mr. LITTLEFIELD. You mean they could not do the same thing?

Mr. DAVENPORT. Could do it.

Mr. LITTLEFIELD. They prohibited them from it?

Mr. DAVENPORT. Yes; that was the idea; they wanted to prohibit them.

Mr. LITTLEFIELD. Do you not think that Mogul case traveled on pretty thin ice?

Mr. DAVENPORT. The court decided that way.

Mr. LITTLEFIELD. Do you not think it traveled on pretty thin ice?

Mr. DAVENPORT. Well, you think that the courts of England ought to have declared it illegal?

Mr. LITTLEFIELD. I am not asking that question. I am asking whether there is any other case so extreme as the Mogul case to be

found in the reports, where they sustained conduct such as was disclosed in the Mogul case?

Mr. DAVENPORT. I am not prepared to say as to that.

Mr. LITTLEFIELD. If there is any such, I have not seen it.

Mr. DAVENPORT. But the principles there are the fundamental principles of the law of England.

Mr. LITTLEFIELD. The principles are all right, as far as the operation of the principles is concerned, but the great question is whether they distorted the case or whether they wrenched the principles when they applied them to the facts. The principles are all right. I am asking you if you do not think it is a very extreme application of the doctrine.

Mr. DAVENPORT. I can not say from my imperfect acquaintance with the decisions that it is, at common law. But in the modern development of business it is such as justified Congress in enacting this second clause in the Sherman antitrust act. In the Northern Securities case they looked right through the form of the language and said that the incorporation of the Northern Securities Company was only a combination of the stockholders of the several roads.

Mr. STEBBINS. Carson on Conspiracy extends the definition still further. He adds to the common definition by saying that the means and the end may both be legal, but it would be a conspiracy if it was injurious to the public; and also the means and end could be legal and lawful, but it might be still a conspiracy if it was oppressive to individuals.

Mr. LITTLEFIELD. Does he give the authorities to sustain his text?

Mr. STEBBINS. Yes. He gives that definition at the close of a late edition of his work.

Mr. LITTLEFIELD. I have read the Mogul case a good deal, and I can not see where they get the foundation for that distinction.

Mr. DAVENPORT. You remember in that other case, which startled everybody, decided by the House of Lords, the Flood v. Allen case, the court below put it to the jury in such a way that they eliminated the idea of a conspiracy, and upon the elimination of that the majority of the judges said that what they did was lawful; that if the idea of conspiracy had been present the case would go the other way. It was later, in the case of Quinn v. Letham, which was a boycott case in the House of Lords, that the opposite result was reached, because the acts were, in the judgment of the court, a conspiracy.

While we are talking about the existing Sherman antitrust law, I want to call your attention to some of the most remarkable omissions in this proposed bill. I would assume that the great and clear-headed men that were drawing it must have noticed these things. You will observe that section 1 of the Sherman antitrust act relates to conspiracies in restraint of trade among the several States and with foreign nations. The second section relates to provisions in regard to monopolizing or attempting to monopolize or combining or conspiring with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations. Next comes section 3, which reads as follows:

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce, in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory



and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or the District of Columbia and any State or States or foreign nations, is hereby declared illegal.

So we have here an independent section, section 3, which is one of the first six sections of this act, which relates to combinations and conspiracies in restraint of trade and attempts to monopolize trade, although that is not mentioned in this, I believe, in the District of Columbia or in any Territory or in trade between a Territory and any State or States or the District of Columbia, or with foreign nations. When you come to examine this bill, there is no reference to that whatsoever.

Mr. LITTLEFIELD. There is no reference to what? To the District of Columbia or the Territories?

Mr. DAVENPORT. Yes; and the trade between them.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. Then as to labor, you may, perhaps, have heard that there is a great organization which extends throughout the United States, which has its headquarters in the District of Columbia. I refer to the American Federation of Labor.

Mr. LITTLEFIELD. I have heard of it.

Mr. DAVENPORT. The first question that occurs to a person reading the Sherman antitrust act is, Where does Congress get its power, in the first place, to regulate trade between the Territories and the States or between the District of Columbia and the States? It is not granted in the clause to regulate commerce among the States.

Mr. LITTLEFIELD. Would not that follow where you get your contiguous territories, with one sovereignty having the entire control of both, with the intervention or interposition of no other sovereignty; would not that give to the sovereignty having authority over both contiguous territories the authority to regulate the subject-matter in the whole territory?

Mr. DAVENPORT. We assume that they have. At any rate they have exercised it.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. Of course the Federal power in the District of Columbia is complete. All the power that the Federal Government has got within the States and all the power that the States have got, and more too, is vested in the Government of the United States in the District of Columbia.

Mr. LITTLEFIELD. It is not what we would call the Federal power, but is a general power of sovereignty.

Mr. DAVENPORT. Yes, and it is not confined by any of the limitations, for instance, that a State may have as to its constitution. It may exercise exclusive jurisdiction in all cases whatsoever; and that becomes quite important, perhaps, in considering the question about the powers to be conferred in this bill upon the supreme court of the District of Columbia; because you know that the supreme court of the District of Columbia has all the powers of a State court, but it has a vast number of other powers conferred upon it by the legislation of Congress, which Congress could not confer upon a circuit court of the United States, or, of course, upon a State court.

Mr. LITTLEFIELD. It would be limited by the Federal jurisdiction.

Mr. DAVENPORT. And of course the power over the Territories is conferred by the power to make all needful rules and regulations

for the property of the United States. It is in an entirely different section, as you will remember, of the Constitution; it is not in the general grant of powers to Congress.

Mr. LITTLEFIELD. Needful rules and regulations of the territory of the United States?

Mr. DAVENPORT. Yes; it is a peculiar provision of the Constitution, and, as of course we know from the cases that have arisen in times past, and the construction put upon the matter, there is a vast distinction between the legislation in the Territories and the legislation in the District of Columbia, and the legislation under the general powers of Congress in regulating affairs between the States.

Mr. LITTLEFIELD. Is it your idea that this omission occurs in this proposed legislation through inadvertence, or that it is an intentional omission?

Mr. DAVENPORT. I do not know, but I want to call your attention to this. Away back in 127 U. S. occurred the case of Callan and Wilson, which decided that a boycott was a criminal conspiracy at common law. Mr. Ralston succeeded in getting a gentleman who had been tried in the police court and convicted by the police court for a boycott out of the hands of the marshal by a writ of habeas corpus brought to the supreme court of the District of Columbia and carried up to the Supreme Court, upon the ground that boycotting is an offense at common law, a criminal offense at common law, and that it was not only a criminal offense, but that it was a heinous offense which he, according to the principles of the common law, was entitled to have tried by a jury. That case has been referred to over and over again, and was cited by Mr. Justice Harlan in the case of *Arthur v. Oakes* (63 Fed. Rep). It has been cited innumerable times in the State courts, and recently in the Supreme Court of the United States. There you have a law of the District of Columbia regarding a boycott, pure and simple.

Mr. LITTLEFIELD. Did that case hold that the common law obtains in the District of Columbia?

Mr. DAVENPORT. Yes; It was a part of the common law of Maryland, and therefore the common law here. That is the law. I want to call your attention to just what this is. I do not know whether Machiavelli himself drew this act, or whether they blundered into these things. I assume that when things are contrived in such a way that they bring about such a result, and it sticks out in every part of the machinery, that it was contrived to bring about such a result. But I want to show you how this law would fit into the District of Columbia, where the headquarters of the American Federation of Labor are. I want to call your attention to what kind of a thing they did, and see how completely it is covered by this bill.

Mr. LITTLEFIELD. You say how completely it is covered by the bill?

Mr. DAVENPORT. The proposed bill.

Mr. LITTLEFIELD. Do the provisions of the bill apply to them or are they rendered immune by the provisions of the bill?

Mr. DAVENPORT. They are rendered immune. This is highly important. In the case of *Callan v. Wilson*, 127 U. S., beginning at page 541, I read the following statement of facts:

The information showed that one Franz Krause, Louis Naecker, August Naecker, Charles Arndt, Louis Naecker, jr., Herman Feige, Gustav A. Bruder, Fritz Boetcher, Herman Arndt, Julius Schultz, Louis Brandt, Casper Windus, Ernest Arndt, and

Christian Feige were, during the months of July and August, 1887, residents of this District, each pursuing the calling of a musician;

That during those months there was in the District an association or organization of musicians by the name of "The Washington Musical Assembly, No. 4308, K. of L.," containing 150 members, and a branch of a larger association known as "The Knights of Labor of America," extending throughout the United States and having a membership of 500,000 persons, of which 10,000 were residents of this District;

That during the period named Edward C. Linden, Louis P. Wild, John N. Pistorio, James C. Callan (the appellant), Joseph B. Caldwell, George N. Sloan, and John Fallon, Anton Fischer, and Frank Pistorio were members of the said local assembly, each pursuing the calling of a musician;

That on the 17th of July, 1887, said local association imposed upon Frans Krause, one of its members, two fines, one of \$25 and the other of \$50, which he refused to pay upon the ground that they were illegal; and

That said Linden, Wild, Pistorio, Callan, Caldwell, Sloan, Fallon, Fischer, with sundry other persons, whose names were unknown, did, on the 7th day of August, 1887, unlawfully and maliciously combine, conspire, and confederate together to extort from Krause the sum of \$75 on account of said fines; to prevent the parties first above named—Krause, Naecker, and others—and each of them from pursuing their calling and trade anywhere in the United States; and to "boycott," injure, molest, oppress, intimidate, and reduce to beggary and want not only said persons and each of them, but any persons, who should work with or for them or should employ them or either of them.

Now, you have an indictment, and of course you must come down to details. You must under the laws of the United States, in alleging a conspiracy, allege a specific act under a section of the Revised Statutes. This statement continues:

The information charged that the manner in which the defendants so conspiring proposed to effect said result was to refuse to work as musicians or in any other capacity with or for the persons first above named, or with or for any person, firm, or corporation working with or employing them; to request and procure all other members of said organizations and all other workmen and tradesmen not to work as musicians or in any capacity with or for them or either of them, or for any person, firm, or corporation that employed or worked with them or either of them, and to warn and threaten every person, firm, or corporation that employed or proposed to employ the said persons, or either of them; that if they did not forthwith cease to so employ them and refuse to employ them and each of them such person, firm, or corporation so warned and threatened would be deprived of any custom or patronage, as well from the persons so combining and conspiring as from all other members of said organization in and out of the District

The information further charged that, on the 8th day of August, 1887, the said persons, among whom was the appellant, in execution of the purpose of said conspiracy, combination, and confederacy, sent and delivered to each member of the "Washington Musical Assembly, No. 4308, K. of L.," and to divers other persons in the District, whose names are unknown, a certain printed circular of the tenor following:

"SANCTUARY WASHINGTON MUSICAL ASSEMBLY, 4308 K. OF L.,

*"Washington, D. C., August 8, 1887.*

"DEAR SIR AND BROTHER: In accordance with a resolution of this assembly, and in compliance with the constitution and by-laws of the order, you are hereby notified that the following-named members of this assembly are hereby suspended for having performed with F. Krause, in direct violation of the official notice of said Krause's suspension from this assembly. You will, therefore, not engage or perform directly or indirectly, with any of them—Louis Naecker, August Naecker, Charles Arndt, Louis Naecker, jr., Herman Feige, Gus. A. Bruder, Fritz Boetcher, Herman Arndt, Julius Schults, Louis Brandt, Casper Windus, Ernest Arndt, Christian Feige.

"By order of the assembly.

[SEAL.]

"E. C. LINDEN, Jr.,

*"Recording Secretary."*

To this information the defendants interposed a demurrer, which was overruled. They united in requesting a trial by jury. That request was denied, and a trial was had before the court, without the intervention of a jury, with the result already stated.

The defendant was convicted and was in the hands of the marshal, and an application was made for the writ of habeas corpus, and the supreme court of the District of Columbia denied the writ, and an appeal was taken to the Supreme Court of the United States, and the question was whether or not these persons were guilty of any crime, and, if so, was it a minor offense, or was it a heinous offense, which entitled them to the common-law right of a trial by jury. The court goes into a long examination of the question as to what was the common law in the District of Columbia, and of course the District of Columbia on this side of the river was set off from Maryland and ceded to the United States, and the laws then in force, on February 28, 1801, I think it was, in Maryland, were the law here, and they followed that down, and they said: "Why, the common law is in force here." Then Mr. Justice Harlan took up the question whether it was a crime. Well, it was. What kind of a crime was it? He says:

Without further reference to the authorities, and conceding that there is a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed in this District, may, under the authority of Congress, be tried by the court and without a jury, we are of opinion that the offense with which the appellant is charged does not belong to that class. A conspiracy such as is charged against him and his codefendants is by no means a petty or trivial offense. "The general rule of the common law," the supreme judicial court of Massachusetts said in *Commonwealth v. Hunt*, 4 Met., 11, 121, "is, that it is a criminal and indictable offense for two or more to confederate and combine together by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual." In *State v. Burnham*, 15 N. H., 396, 401, it was held "that combinations against law or against individuals are always dangerous to the public peace and to public security. To guard against the union of individuals to effect an unlawful design is not easy."

Mr. LITTLEFIELD. He held that it was a heinous offense?

Mr. DAVENPORT. Yes. Now, that is the law of the District of Columbia. What becomes of it if this act is passed?

(At 5.30 o'clock p. m., the subcommittee adjourned until Tuesday, April 21, 1908, at 10.30 o'clock a. m.)

#### COMPETITION.

The word competition has been thus defined by a French lexicographer: "The aspiration of two or more persons to the same office, dignity, or any other advantage." This is, indeed, in harmony with its etymological meaning. Two or more individuals aspire at the same time to the same position, to the same dignity, to the same advantage, no matter what; they vie with each other to obtain it; there is competition between them for its possession. But after thus giving the general meaning of the word, this same lexicographer attempts to give what he calls its commercial meaning, and here he seems to us less happy. He calls it: "The rivalry which exists between manufacturers, merchants, etc., whether concerning the quality of their products, their merchandise, etc., or concerning prices, with a view to sharing the profits of the same branch of commerce, industry, etc." What is rivalry concerning the quality of goods or their price? It is not true that in commerce and industry, competition always has these characteristics; and even if it were they would not constitute its essence. The writer confounds the substance with the form, the principle with the changeable circumstances under which it is produced. Our lexicographer here seems to us misled by the desire to establish between commercial competitions and competition in its ordinary acceptation an essential and generic difference, which does not really exist. In reality they are the same thing. In commerce, as in everything else, by the word competition is meant the struggle of two or more individuals who aspire to the same advantage, and vie with each other to obtain it; the end to be attained is different, and in many respects the means of attaining it are different also. For instance, what a man is in search of in public life is an employment or dignity, from which he hopes to derive honor or profit; in industrial or commercial pursuits, it is

the sale of his products from which he expects a profit. There is a difference in the manner, in the circumstances, but not in the principle. There is a still greater difference in the means employed to obtain the end proposed, because the positions are different. Whoever aspires to a public office which another man disputes with him, lays stress on his personal merit, his talent, and the services which he has rendered.

He curries favor with the ministers, in whose gift the offices are; he obtains recommendations to them from some of his supporters; and it is thus that he endeavors to defeat his rivals. In commerce or industry, the competitors no longer court power, because it is not on power that the sale of their goods depends. They court buyers, and the means they employ consist less in proving their personal merits than in laying stress on the cheapness or the quality of their products. Aside from this, all competition is the same. The endeavor always is to obtain an advantage which is disputed by competitors. To say that commercial competition is a rivalry between merchants as to either the price or the quality of their products is as if we were to say that competition in public life consists in the rivalry which exists between aspirants to office, in respect to either their personal qualities or the services which they have rendered. We have from the beginning of this article endeavored to establish the identity of commercial competition with that general competition which is found in all human activity, because there is in them a common principle. In whatever way it may be produced, competition has always the same point of departure, the same motive, although it has not always the same mode of action nor the same effects. It is universal competition among men which, everywhere and in all the ways of life, prompts men to vie with one another to obtain advantages which are not equally and superabundantly given to all. This competition results everywhere from this fact alone, that mankind have not at their disposal a fund of inexhaustible wealth, a fountain of happiness, fortune, and honor from which each individual may draw at his pleasure without ever exhausting it. In public life, as the number of offices, especially of easy and lucrative ones, is not as great as the number of men who aspire to them, there is naturally a competition among these men for their possession. In commerce, likewise, as the number of buyers never equals the number of things to be sold, there is competition between the sellers to obtain the preference in the market. Who does not clearly perceive here the identity of principle? In both cases competition is caused by the insufficient quantity of the goods wished for, and the natural desire of each one to obtain as many as he can of them. It is born with men, and it will not cease to exist until men discover the means of infinitely increasing all the objects of their desires.

But competition, as we have already seen, proceeds differently according to the course it follows and the end it has in view. In all cases, and in whatever manner it appears, it has its useful effects, to which, considering the imperfections of human nature, are attached certain inevitable inconveniences. Because of the competition which exists between those who aspire to public offices, they vie with one another in making themselves more deserving of them by rendering better service to the government which employs them. If there were always only one man fit to fill each of the offices dependent upon the government, we may be sure that this one man would take his ease, and that public duties would, in general, be very badly performed. It is because each employee feels that he has competitors, either actual or possible, that he endeavors to perform his duties well, and especially to furnish no just cause of complaint. In commerce, likewise, it is because of the competition among sellers that each one of them endeavors better to satisfy the public by giving them products of a better quality or at a lower price. If there were but one producer of each of the objects of human consumption, this one producer would also take his ease and would hardly dream of improving either the conditions of his production or the quality of his products. This is but too often the case wherever there exists a monopoly. Competition is, therefore, here as elsewhere, a necessary condition, that industry may be kept up and the public well served.

Connected with these advantages there are inconveniences, some of which are inevitable, because they result from the very nature of man, while others, sometimes more serious still, result accidentally from the unfavorable circumstances in which certain countries are placed.

In the case of Government employees, it sometimes happens that the competitors, instead of vying with one another solely in talent, merit, or services rendered, make use of deceit and intrigue striving to obtain by favor, or by means still less reputable, what should belong to merit alone. They strive to win over, to overreach, and to deceive the men who control the patronage; they seek to influence them by recommendations they have obtained by begging, and sometimes even to bribe them. In like manner, in commerce or industry, intrigue, imposition, and fraud too often usurp the favor which is due to real merit. The public are deceived by gaudy sign-

boards or by fallacious announcements; they are attracted by the bait of cheapness, and are cheated with adulterated products. Nor are they deceived in the quality of the merchandise only, but sometimes in weight and measure as well. Thus it is that in this common pursuit of public favor, the most crafty, the most intriguing, the most deceitful frequently get the better of the most skillful or the most deserving. If there be any difference to be made in this regard between commercial competition and that which occurs in public life, it is all in favor of the former; for the public, who, in the purchases they make from merchants always act on their own account, and with a view to their own most immediate interests, are much less easily deceived than a government which never acts but through the medium of its chief agents, who have no direct interest in the selection which they have to make, and with whom petty considerations of vanity or personal ambition frequently take precedence of the public interest which it is their duty to serve.

Although the disadvantages which attend competition are, to a certain extent, inevitable since they proceed from the imperfection of human nature, and in this sense are almost the same everywhere, we must admit that they are more or less serious, more or less apparent, according as society is in an embarrassed or a prosperous condition. When society is prosperous, when there is abundant employment for labor, so that every individual easily finds an opportunity to use his faculties, competition, without being entirely stripped of its excesses, is everywhere more moral and keeps more within proper bounds. As every man is almost sure of receiving his share of prosperity and of obtaining in return for the performance of his duties toward society a share of the goods which it distributes, he is less severe upon his competitors. Each one still strives to obtain as much as he can of social advantage, and competition never ceases to be earnest; but, after all, it is only a question of more or less; competition is generally confined within its proper limits. If a person has the least feeling of his dignity as a man he disdains to resort to dishonest means; it is by real merit that he endeavors to excel his competitors. This is no longer the case in a society that is disturbed, constrained, and ill at ease, and that can give employment to only a portion of those who crave it. In this society, as there is no longer enough for all, competition between individuals, whether in public life or in commercial pursuits, is no longer a simple question of preeminence; it is oftener a question of life and death. A man then must get the better of his rivals or perish. Here it is that competition becomes at one time fierce and cruel, at another immoral and perfidious, and that we find everywhere, as well in public life as elsewhere, a great number of men to whom all means seem good. In these critical situations competition, under whatever form, and in whatever way of life it appears often presents, we must admit, to the eye of the philanthropic observer a very distressing spectacle. Nor must we judge too severely those men of a weak and unphilosophic spirit who, witnessing these scandals the causes of which they could not fathom, conceived the senseless and, besides impracticable project of suppressing competition itself. They did not see blinded as they were, that, even if they had succeeded in their plans, they would not have destroyed competition; they would merely have removed it without in the least correcting its abuses. Still less were they in a condition to understand to what degree this simple removal would have been, in other respects, unfortunate for the human race all of whose resources it would have lessened, and all of whose labors it would have disorganized.

We would not have the reader imagine that in what we have just said our object was to defend industrial or commercial competition against the puerile attacks which have so frequently been made on it. It has always seemed to us as ill becoming economists to stop to defend such a principle; it is too entirely inherent in the primary conditions of social life: it is, at the same time, too great, too elevated, too holy, and, in its general application, too far above the attempts of the pigmies who threaten it, to need any defense. We do not defend the sun, although it sometimes burns the earth, which it should only illumine and warm; neither is there any need to defend competition, which is to the industrial world what the sun is to the physical world. The economist's task is merely to explain its action in the industrial sphere, and to show its marvelous effects. This is the best defense of it we can offer, and it is the only one which becomes it.

If industrial competition does not differ in principle from the competition to be found everywhere else, and especially in public life, it signally differs from it in its consequences which are far richer in results. Looking at it in the first instance only as a necessary stimulant of general activity, although it acts in this sense upon Government employees as well as upon merchants and those engaged in industry, it has incomparably greater effects upon this latter class.

The task of public officials generally consists in obeying, to the best of their power, the instructions they have received from those above them. They move in a circle traced out for them in advance, and which they can not leave even to do more or to do

better. The only effect of competition among them is, therefore, to render them more punctual, more exact in the performance of the orders given them by those above them. They can perform them, it is true, with greater or less intelligence but they can not, as a rule, add anything to them of their own accord, nor, consequently, invent or change anything for the sake of improvement. Besides, in spite of this competition, of which we were just speaking, the administration of all the governments of the world are in their nature stationary, and almost inaccessible to progress. Their accepted forms and methods, no matter what vices they may conceal, are almost invariable. Hardly anything else than a revolution can change them. If a change in the way of progress is sometimes made, which rarely occurs, it can come only from those who are intrusted with the general direction of the Government, and who inspire its entire policy. It is unnecessary to add that innovations fertile in results are at all times very rare.

It is not so with industrial pursuits, in which every individual, or at least every man of enterprise, acts on his own account and with entire independence. Here competition no longer appears merely as a prompter of activity, exactness, punctuality, and order, although it produces these useful results here as well as elsewhere; it here appears also and especially as the principal agent of progress. And all these manufacturers, masters of their actions and responsible for their works, stimulated as they are by the incessant competition of their rivals, contrive how they may more and more simplify labor, improve its methods, perfect known processes, and invent new ones. One man invents a machine to lessen labor and diminish the cost of production; another invents a chemical compound to improve the quality of his products; a third, a form of the division of labor so as to simplify its workings; a fourth, a system of accounts more convenient than the old ones; a fifth, a quicker or better way for transporting and distributing products, and so on. The question is, which one will surpass his rivals by the abundance and usefulness of his improvements. In this way, besides, application of these improvements generally follows close upon their invention, which is different from what is remarked in other pursuits; because here competition always makes itself felt. Progress, therefore, is here uninterrupted and lasting. If in the sphere of governmental administration useful improvements can come only from those in power, and occur but rarely, in the industrial sphere they come from all sources, and occur every day in all branches of labor. And what is it that prompts them? Always the same cause—competition. It is the first, we might say the only, cause of this upward march of mankind, and of the continued progress so visible in history, which would have continued ever uninterrupted were it not for the grave political disturbances which have at times broken its course.

Competition is, therefore, in fact, the true motive power of progress in human society. Suppress this necessary stimulant, and at once the movement slackens, activity dies out, progress ends. Much could still be said to bring this great truth into full relief; but it has been often explained, and is generally admitted by everyone who examines and reflects. It is better, therefore, to insist upon another truth, no less important and much less generally understood, namely, that competition is, in the industrial world, which embraces the entire, or almost the entire, social world, the principal cause of order. It here plainly takes leave of that other competition of which we spoke above. In the world of governmental administration everything moves, everything is regulated and ordered in obedience to the decisions of superior authority. In industry there is nothing of the sort; there are no orders to be received from higher authority. What, then, takes the place of this superior absent authority? Who governs this industrial world, in default of a directing power? Chance, some say. It is not chance, but competition, which is here the one sovereign regulator. Men often believe they have said everything in favor of this immortal principle when they have recognized that it is a necessary stimulant for producers; but even then they are far from understanding its marvelous effects. Competition is the supreme guide, the infallible regulator of the industrial world; it is the first source of the providential laws by which this world is directed and governed; it is, if we may be allowed to say so, the legislator, invisible but always present, who introduces order and rule into industrial relations so extended, so varied, so multiplied, where, without it, would be but confusion, disorder, chaos.

Let us picture to ourselves this industrial world in its multiple and complex organization, as it has existed since the exchange of product for product and of service for service became its general law, and since the division of labor was everywhere established. In virtue of this division of labor no one in this industrial world produces, for himself—that is, to consume the fruits of his own production. Each man in it, on the contrary, chooses a special branch of production to which he applies himself, and which, taken in itself and isolated from the rest, would answer frequently to a very small proportion of his needs. In the savage state every man labors directly for him-

self and consumes what he himself produces; he pursues a wild animal; he knocks it down with weapons which he himself has made; he tears it up with instruments which are of his own workmanship; he roasts it with wood which he has gathered with his own hands, and devours it. The entire labor of production is performed by the same hands, and, moreover, the producer and the consumer are one. This savage may, it is true, associate himself with others in his work; but even this association does not affect unity of production, nor the identity of the producer with the consumer. This is no longer the case in our more or less civilized condition, which, thank God, is not of yesterday. In it each man works for his fellow-men; he takes his products or his services to the general market; he offers them to all who ask for them, and counts only upon exchange to obtain in return the different objects he requires for his own consumption. One man is a bootmaker, and produces boots only; another is a hatter, and makes nothing but hats. This man is a butcher; that one a baker; another is a smith, a distiller, a lamp maker, or a druggist. Of the thousands and thousands of things which human consumption constantly demands, each man produces but one, and adheres to that. He gives his services to whoever demands them, relying for his own personal consumption upon what he will obtain by means of exchange from all other producers. Still it rarely happens that any of these different individual labors produces a complete product. There is scarcely a product which is not the result of several successive elaborations, and generally each of those who have concurred in making it can claim but a small portion of it, not to speak of those who never put their hand to any special production whatever, and therefore concur only in an indirect manner in general production. In this state of things, as is readily seen, each man is dependent upon the rest; as a producer, he is bound to an immense chain, of which he forms, so to speak, but one link; as a consumer, he expects everything from his fellow-men, and can obtain the satisfaction of his wants only by a great many exchanges. It is this division of labor which constitutes the strength, the wealth, and the greatness of civilized nations, and raises them so far above the savage tribes of the new world; but from it also flow infinite social complications—complications such that it would be impossible for human foresight to unravel them, if they did not unravel themselves, in virtue of a higher pre-existing principle. What is this principle? Competition, which is, in this, truly the light, the guide, and the providence of the civilized world.

And, first of all, since there is in the industrial world as it exists a necessary, universal, and constant exchange of products and services, all these products, all these services must be weighed and measured in some way, in order that we may know on what terms an exchange of them can be effected. Who can weigh them? Who can determine their measure? When we consider the infinite variety of the products which are every day displayed in the great markets of the world, all different in their form, in their texture, and in the conditions of their manufacture; when we consider besides how many different hands have concurred in such unequal proportions, and in a thousand different places, in the manufacture of each of these products; when we take into account the still greater variety of services rendered which have not resulted in any material product whatever, and which must, nevertheless, be exchanged for real products; when we reflect that we must compare and measure all these products, all these labors, all these services, in order to establish an equivalence among them, we ask ourselves by what superhuman prodigy can this equivalence ever be determined? Is there a human power which would dare, we will not say to establish it, or even to undertake it, but merely to conceive the idea of formulating its laws?

We are told that men dared to do it at the time of the French revolution. They dared to do it, but under what conditions, and at what price? It was established, in the first place, only for a limited number of the commonest products, and those whose value seemed easy to estimate, without entering into the detailed appreciation of the thousand different kinds of labor which had contributed to their production. And even for these products they did not establish any precise value, but only a maximum, determined from their former value as fixed by competition. Besides, who does not know the results to which these senseless measures led? Incomplete as they were, and although scarcely ever carried into execution, they were none the less the cause of frightful disorder in all commercial relations. If they had been pushed any further they would have plunged all society into chaos.

In spite of the inevitable failure of these disastrous endeavors, there are still in the world, we know, some discontented spirits, some crazed brains, which dream from time to time of a fixation of relative values by governmental regulation; but even those who cherish these chimerical projects in their unfortunate moments, would recoil, we may be sure, before the difficulties of the task if they were ever bound by law to accomplish it. Every man possessed of common sense must clearly perceive that it is an undertaking far above the endeavor of any human power to determine the relative value of all the products and of all the services which are daily exchanged



in the world's markets. Who, then, will establish this regulation? Who will work this wonder? Who? Competition, which alone is able to accomplish it.

"It is competition," says Montesquieu, "which puts a just price upon goods." It is competition, and competition alone, which can put upon goods their just price. But it does this, not only for goods properly so called; it does it also for the thousand different labors which have contributed immediately or remotely to the production of these goods, as well as for the innumerable services which have not entered into any product whatever.

We should, perhaps, remark here in passing, that when economists explain the laws by means of which the prices of everything that is bought and sold are determined, they do not ordinarily point to competition; they point to the principle of supply and demand, and we would by no means find fault with them for doing so. But the principle of supply and demand, as it is here understood, presupposes the action of competition; it supposes this action both in the sellers and in the buyers; for if we leave competition out of consideration, the principle of supply and demand has no longer any meaning; it ceases to produce any of the good results which are justly attributed to it.

The price which competition puts upon merchandise is, in general, equivalent to the cost of production, in which we must include the necessary profit of the producers. What is the cost of production? Of what does it consist? It consists of the sum of all the expenses, small or great, which have been incurred in a thousand different ways by a thousand different hands, and perhaps in many different places, to bring a product to the point it reaches at the moment of sale. Who can compute exactly the cost of production? Nobody, not even the seller, who will give you at most, an exact account of the expenses which he has personally incurred on account of this product, but who will never be able to tell you what it cost, before coming into his hands. If it were necessary to determine in an official manner the cost price of only one of the products which are daily offered for sale in the market, a pretty thing it would be to see all the officers of the various governments at work. In vain would they assemble for this purpose the wisest statisticians, the most expert merchants, the most skilled manufacturers, and the ablest administrators; in vain would they add to these a reinforcement of real economists; all these lights united could not accomplish such a task; there would necessarily occur a great number of errors in their calculations. But, what all the science of such a council could not do for one single product, competition does without an effort for the millions of products in circulation. It does it so well, according to principles so sure, and with a precision so infallible, that there is not anywhere, where competition exerts its full power, a single product which sells regularly either for more or for less than it really cost from the time of its first formation to its entire competition.

Not that it has not, in this respect, inequalities and variations, some accidental, other permanent. But even these inequalities have also their *raison d'être*. They are not determined by chance; far from it; they are governed by laws and rules, and all tend to the better ordering of this industrial world which we have described.

When there are—as is usually the case, and as it is even essential that there should be—a certain number of producers who are engaged in the same kind of production, the price which competition puts upon their merchandise is not determined for each one of them by the cost price of the merchandise to him, which may, and almost always does, vary with different producers. The price which competition puts upon their merchandise is the common or medium cost price. It there are among them some more skillful than the rest, who have been able by means of better processes or greater attention to economize more or less in the cost of production, these gain a little more by selling at the same price; they grow rich, and it is only just that they should; it is the legitimate reward of their skill. It is, at the same time, an incentive to all other producers. If there are, on the other hand, producers who, less attentive or less skillful, have allowed their cost price to exceed the medium, they suffer loss and ruin; it is the necessary penalty of their carelessness or their incapacity. Most producers keep their cost price at the ordinary level, and these maintain themselves; these do not grow rich, but then they are not ruined.

Besides these inequalities between producer and producer, which are a necessary stimulant to the activity of all, there are others, consisting in variations of the selling price, which frequently occur without any corresponding change in the cost price. These variations are the fluctuations of the market. There is no product which is not subject to fluctuations of this kind; the differences between them, in this regard, is merely a question of more or less. Some are it is true, for the convenience of consumers, marked at fixed prices in the stores, where they are sold at retail, but they have, nevertheless, in the general market and at wholesale, prices which vary more or less, according to times and circumstances. Why, it will be asked, these fluctuations in the

selling price, which should always be regulated by the cost price? Is not this a game of chance, which destroys the equilibrium of things and overturns the general law we have just stated? Is there not at least an inaccuracy, a defect in the picture? It is not a game of chance, there is no inaccuracy or defect; it is, on the contrary, one of the simple but providential means which competition employs to regulate the world. But to make this clear we must consider another phase of the marvelous order which it establishes.

It is something great to determine the relative value of products. Without it, as we have said, the industrial world would not last a day. But it is not enough to determine this value. If it is necessary that products be exchanged according to stated conditions, it is no less necessary that producers or workmen be regularly supplied to the innumerable sources of production; in other words, that labor producers be distributed exactly in proportion as they are needed. Here is another problem as grave and important as the first and which human wisdom would find itself powerless to solve if there were not always present this mysterious power which guides men without their knowledge. If in the industrial world products are innumerable and of infinite variety, the different kinds of labor which concur in the formation of these products are neither less varied nor less numerous. All these laborers are, besides, necessary and in almost the same degree. Their dependence one upon another is such that no one of them can be neglected without the other suffering thereby. How, for instance, could the baker make his bread if the miller had forgotten to grind his wheat? And how could the miller give the baker his flour if the farmer had forgotten to sow, to reap, and to thrash his grain? How could the farmer, in turn, give the miller his grain if the plowright and the blacksmith had not made in time the necessary implements for plowing, harvesting, and thrashing this grain? The work of the blacksmith is no less dependent upon that of the miner who takes the iron from the mine than that of the plowman is upon the work of the blacksmith. In addition, all are equally dependent upon the work of the carrier, who transports their respective products, as well as upon the services of the public agents who provide for the security of these products while being transported. Human industry is like an immense chain, all the links of which are united. Let one of these links be broken and the whole chain gives way. It must, therefore, be so arranged that none of its works will ever be abandoned or omitted; that they will be accomplished exactly at their proper time and in proportion to the needs of every day. Who is charged to provide for such a want in society? Nobody; and we may add that nobody could do it. The different employments of industry, the labors of all kinds which are performed in all the different degrees of production, are so numerous that no person could even count them, much less provide for them. To see that every one of these innumerable forces is kept daily at work is a task so far above all human foresight that it would be absurd to dream of intrusting it to man. It has, however, been dreamt of at times. Under the pretext that the satisfaction of the wants of society was abandoned to chance it was seriously proposed to confide to a self-styled social power the duty of regulating the different employments and methodically dividing all available forces among them. But before disposing of these forces and apportioning them let this power determine to attempt merely to name them exactly or completely; the sight of the insurmountable difficulties of this first task will perhaps convince it that it has hardly understood, until the present moment, the incalculable extent of what it has dared to undertake.

Some have compared the organization of industry to the organization of an army, and though that, as men had succeeded perfectly in regulating the movements of an army, they could, in like manner and just as easily, regulate the movements of industry. How pitiable a comparison! As if the organization of an army, where their occupations are all alike, and vary, at most, from one branch of the service to the other; which has but one object for all; which can and must be divided regularly and systematically into regiments, battalions, companies, etc.; which always resides in certain chosen places and under the control of chiefs—as if the organization of such an assemblage, we say, could be for an instant compared to the organization of industry, whose employments are so numerous; which uses different processes and instruments in each of these employments; which must be divided among an infinite number of different places, so as to be at all the sources of production and distribute its forces everywhere in unequal groups, according to the needs and resources of the respective localities; which by its very nature refuses all regular division and uniform movement, and for which unity of direction would be death—to compare these two things is to compare an atom to a whole world. We repeat, therefore, there is no human power which can foresee and know all the work to be performed in the different channels of industry or which, for a still stronger reason, can provide for its doing. What then will do it? The same mysterious and sovereign power that has already regulated the relative value of exchangeable products—competition—a power much more enlightened

and much more active and vigilant than any of those to which the care of public interests is ordinarily confided.

The means which it employs are, moreover, very simple. The first is to keep all its particular interests constantly on the alert by according the favors of fortune in all things only to the most vigilant, the most active, and the most skillful. The second is to direct the particular interest of each man to the satisfaction of the wants of his fellow-men. As long, in fact, as competition acts alone, and violence or fraud do not interfere, the only way for a man to get the better of his rivals is to provide better than they the means of satisfying in a more prompt, more suitable, and more complete manner the wants of those around him. Thus, by the aid of competition, if there are in society such as civilization has made it a million different wants, there are also several millions of eyes incessantly open to discover these wants, several millions of minds incessantly occupied in studying and understanding them, and several millions of arms ever eager to supply them. The duties to be performed in the various branches of industry are very numerous, it is true; but the eyes which watch them are still more numerous. There is no danger that any necessary or even useful employment will escape this active and general vigilance; no sooner does a branch strike or languish, than a crowd of competitors offer to take its place. Thus it is that in this long and multiple chain of industry, which coils about itself in a thousand different ways, and which is made up of innumerable links, there is never any break or gap. Thus it is that this incredible prodigy before which human nature must bow is accomplished in a manner so natural and so simple that we are no longer even surprised at it.

But it is not enough, however, that all the occupations of industry be filled continuously and completely; they must also be filled in the proper proportion. That is, the number of men who labor at them and the amount of energy or capital consecrated to them, must always be proportioned to the real extent of the work to be done. Here again we propound ourselves this eternally recurring question: Who in the world could furnish this just proportion? And we are forced to reply once more, no one, not even the producers. Competition alone can do it, and competition alone does do it, competition alone instructs the world in this regard, beginning with the workmen themselves, who could not determine, without its aid the amount of labor necessary even in the special branch of production in which they are engaged. And how does competition instruct them? By increasing or diminishing the mean profits in each branch of production, according as the labor applied to this branch more or less fully corresponds to the extent of its wants. If there be too much labor applied in any certain production at once, thanks to competition, wages decline and the laborers are thereby warned to seek employment elsewhere. If, on the contrary, there be a scarcity of labor, wages go up, and this is a warning to those who are engaged elsewhere to betake themselves in greater numbers to where the scarcity exists. Thus, by the sole influence of high or low wages, labor is distributed and divided with an almost infallible precision among the different branches of production, according to the measure of their means, and equilibrium is always maintained between the work to be done and the labor assigned to it. Here it is that we most recognize the necessity and providential effect of those fluctuations of the market of which we spoke above.

The wants of society are not ever the same; on the contrary, they vary from day to day in regard to most objects of consumption. Suppose, therefore, that by a marvelous effort of some public power, the equilibrium of the different branches of labor had been exactly established to a given day, so that for each piece of work to be done there would be at hand a corresponding amount of labor, still nothing would have been done, if allowance had not been made for the fact that this amount of labor varies for each occupation, according to the variable measure of its wants. To-day, for instance, a capital of 10,000,000 francs and a force of 1,000 workmen are applied to a particular branch of production and they are nearly the exact measure of what it needs at present; but to-morrow its needs change, the product which this branch of industry supplies is most in demand where there is least of it, this is what happens every day, not only for articles of fashion, but for many others. The capital and labor devoted to this kind of production find themselves, therefore, all at once either insufficient or superabundant: they must be increased or diminished in order to preserve the equilibrium. Who will regulate these frequent and rapid variations? Sometimes, even without the wants being diminished, production may, with the same amount of capital and labor, become all at once superabundant simply because the processes of manufacture have been simplified. Who will restore it to its proper proportion? Always the same principle—competition; and the means which it employs for this end consist precisely in these variations in price, in these fluctuations of the market of which we are speaking. They are necessary and daily warnings for the producers. If prices rise, they understand that the merchandise is becoming rare and that they must hasten to supply themselves with more of it; if, on the contrary, prices fall, they understand that the

market is overstocked and that they must slacken production. Thus production is constantly kept within bounds and taught to limit itself in all its branches by the extent of man's wants. Hence, that marvelous equilibrium of disposable resources and wants to be satisfied, which is the normal state of civilized societies, and at which we might well be surprised, if we could experience surprise at anything we see every day. When the changes in the extent of the demand are considerable and sudden, as sometimes happens, it is not always possible, it is true, to reduce or increase the production instantly in the measure desired, and hence some accidental disturbances occur here and there: but in this case the change in the selling price, which continues as long as the derangement exists, does not cease to warn and annoy the producers, and to urge them to reduce or increase their labor to the desired proportion.

Economists generally say too little about competition, at least in express terms. They rarely even pronounce its name. They are incessantly invoking the principle, however, in disguised terms. It is impossible, in fact, to establish or to carry out any of the laws which political economy has produced, without the intervention of competition, for all these laws are based upon it. In the work of production, as in the distribution of wealth, competition appears throughout, not as an accidental fact, but as the sovereign regulator. It is competition that regulates the price of goods; determines salaries and profits; that fixes a ground rent when there should be one; which, in a word, establishes the rate of remunerations and values of all sorts. They say, and say truly, that it stimulates producers; but it does much more, it distributes, classifies, and arranges them. If it is the stimulant of production, it is also the check. It is a light and a guide still more than an incentive. We may truly say that industrial order, as it exists, is its work. Imagine, if you can, even one economic truth, even one of the rules and laws which the science promulgates, of which it is not the source. Economists, it is true, invoke it incessantly, but they do so nearly always without naming it.

In some respects this matters but little. Whether they appeal to this principle by name, or designate it by the circumstances it implies, by its action and effects, it is ever in reality the same thing. It does not on this account lose any of its essential truths. In consequence of this reserve or forgetfulness of the masters of the science of economy, however, competition has not in their works the place which is due to it; this immortal principle is not as clearly manifested as it should be, nor is its grandeur sufficiently understood. It is this, perhaps, which has given a certain credit to the puerile declamations of those who attack it; and this also explains how even the adepts in the science have sometimes dishonored it by the unworthy capitulations to which they have submitted it or by the incredible feebleness of the arguments which they have used in its defense.

It has sometimes been said that industrial competition was a new principle, inaugurated in 1789, and one of the fruits of the French revolution. As if humanity could have reached the point of civilization which it had reached at this epoch without knowing this powerful lever, this sovereign guide, so necessary to the development of its activity. After what we have just said, it seems to us superfluous to demonstrate the error of such an hypothesis. Competition was not born in 1789, it was born in the very cradle of human society, which it has led step by step from its state of primitive barbarity to the point of civilization which it now has reached. The truth in the case is, that competition, although it has never ceased to enlighten and govern the world, has been submitted at all times to restrictions of more than one kind, the sad effects of the errors or evil passions of men; these restrictions were more numerous previous to 1789, at which period some of them were suppressed, though they did not, alas, entirely disappear.

If competition had always reigned without opposition, if it had been able to develop itself in all its plentitude in the midst of human society, such is the virtual strength, the power, and inexhaustible fecundity of this principle that humanity would have marched from progress to progress, and with unceasing rapidity, toward a future of prosperity, wealth, and general well-being, of which at present, perhaps, it has not the least conception. We can judge of this from the progress it made in certain countries during the intervals, always too brief, in which it enjoyed a satisfactory, if not complete, liberty. But this liberty was needed in the past, and is needed in the present. The action of competition supposes the liberty of man at least in his industrial relations. In fact, it supposes, first, absolute spontaneity and freedom between the contracting parties, between the seller and the buyer of an article, between him who offers a product and him who accepts it; for if one of the parties can impose his conditions on the other there is no longer any competition, there is no longer even a contract. It supposes, moreover—and this is also an essential condition—that each one be free to go to a third party when he is not satisfied with the conditions offered him. Now, who does not know to how many obstacles this twofold liberty has been

subjected at all times? These obstacles arise sometimes from the spirit of anarchy and disorder, and from the absence of a tutelary authority able to protect the contracting parties, and sometimes from abuses of this authority.

CHARLES COQUELIN.

COMMITTEE ON THE JUDICIARY,  
HOUSE OF REPRESENTATIVES,  
*Tuesday, April 21, 1908.*

The subcommittee met at 10.30 o'clock a. m., Hon. Charles E. Littlefield in the chair.

**ARGUMENT OF MR. DANIEL DAVENPORT—Continued.**

Mr. DAVENPORT. Mr. Chairman, during the discussion of this proposition on Saturday last I did not have at hand an authority which I told the committee I would produce, upon the subject of the effect of the regulation of commerce by Congress, the point being that because the power of Congress is plenary and exclusive, what it says shall be and shall not be covers the whole subject, and it supercedes—

Mr. LITTLEFIELD. The common-law remedies?

Mr. DAVENPORT (Continuing): The common law bearing upon the proposition.

Mr. LITTLEFIELD. That is, making an application to a particular case—take your clients in the Danbury Hat Case—the existence of the antitrust law deprived you of what would have been your common-law remedy in the State courts.

Mr. DAVENPORT. If the Sherman Antitrust Act should be amended in the manner that is proposed here, it would cut off our common-law right, because Congress has legislated on the subject and said that certain combinations should be lawful, in effect.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. I cite here and quote from the case of *Robbins v. Shelby Taxing District* (120 U. S., 492). The court says:

Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of *Cooley v. Board of Wardens of the Port of Philadelphia* (12 How., 299, 319), and was virtually involved in the case of *Gibbons v. Ogden* (9 Wheat., 1), and has been confirmed in many subsequent cases, amongst others, in *Brown v. Maryland* (12 Wheat., 419); *The Passenger Cases* (7 How., 283); *Crandall v. Nevada* (6 Wall., 35, 42); *Ward v. Maryland* (12 Wall., 418, 430); *State Freight Tax Cases* (15 Wall., 232, 270); *Henderson v. Mayor of New York* (92 U. S., 259, 272); *Railroad Co. v. Husen* (95 U. S., 465, 469); *Monile v. Kimball* (102 U. S., 691, 697); *Gloucester Ferry Co. v. Pennsylvania* (114 U. S., 196, 203); *Wabash, etc., Railway Co. v. Illinois* (118 U. S. 557).

2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons v. Ogden* (9 Wheat, 1, 222); by Mr. Justice Grier in *The Passenger Cases* (7 How., 283, 462).

and has been affirmed in subsequent cases. (*State Freight Tax Cases*, 15 Wall., 232, 279; *Railroad Co. v. Husen*, 95 U. S., 465, 469; *Welton v. Missouri*, 91 U. S., 275, 282; *Mobile v. Kimball*, 102 U. S., 691, 697; *Brown v. Houston*, 114 U. S., 622, 631; *Walling v. Michigan*, 116 U. S., 446, 455; *Pickard v. Pullman So. Car Co.*, 117 U. S., 34; *Wabash, etc., Railway Co. v. Illinois*, 118 U. S., 557.)

So much for that proposition. In the case of *Call v. The Western Union Telegraph Company* (181 U. S.) is found an authority which defines precisely the situation of the United States in regard to the common law. There is no body of common law of the United States, either civil or criminal, which has the same character as a body of substantive law, such as the Federal statutes have, for instance. I thought I had a typewritten extract from that case here, but I can not find it. As I said the other day, each State has a system of common law, and there are common to those systems of common law in all the States certain fundamental principles which the Federal courts in matters pertaining to interstate commerce resort to; but it has not the force of a Federal system of law.

Mr. LITTLEFIELD. One is Federal in its character and the other is State or common law in its character. I suppose that is the differentiation, is it not?

Mr. DAVENPORT. Yes. It is carefully distinguished there, in that case.

Mr. LITTLEFIELD. Where the court has jurisdiction in either civil or criminal matters, that is conferred by the statute, and the Federal court is administering the law, it may be governed by common-law rules in determining the rights of parties.

Mr. DAVENPORT. Yes, in the case of the United States courts.

Mr. LITTLEFIELD. But they do not get any of their jurisdiction from the common law?

Mr. DAVENPORT. The United States courts proper are in cases of diversity of citizenship of course courts in the States in which they sit, in the same sense as the State court is, though independent, and they administer the rights of parties and proceed according to the principles of law applicable to such matters in those States.

Mr. LITTLEFIELD. But they do that by virtue of a Federal statute?

Mr. DAVENPORT. No.

Mr. LITTLEFIELD. Is it not a Federal statute which provides that the same rules shall be applied in the same proceeding?

Mr. DAVENPORT. That is merely as to matters of procedure.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. The chairman asked me the other day a very interesting question when I was reading a quotation from Mr. Justice Matthews, as to the historical accuracy of the statement that the Declaration of Independence was the first official act of this nation, and I referred to a case, as throwing some light upon it, which was decided in the early history of the Government by Chief Justice Jay, in which the doctrine was laid down that the United States originated on the 4th day of July, 1776, and that its national character was not postponed until either the acknowledgment of independence in the treaty of peace in 1783 between Great Britain and the United States, or until the adoption of the Constitution in 1787. I find there are two cases which support that proposition. One, which I referred to the other day, was the case of *Chisholm v. Georgia* (2d Dallas, decided in 1793), and the other is the case of *Ware v. Hylton* (3d

Dallas, in 1796). Both cases involved the consideration of the proposition underlying this subject, and both proceeded upon the theory that the United States became a nation and took its origin in the year 1776. There might be some question raised whether it did not exist even before the Declaration of Independence, in view of the fact that the Continental Congress had really assumed the powers of a revolutionary body, and was proceeding to raise an army—had raised an army and appointed a commander in chief and entered into various international relations thereby, under the laws of nations. I think this proposition is of importance.

Mr. LITTLEFIELD. Was one of those cases a case where the court in the opinion referred to the rights that are fundamental to the social compact?

Mr. DAVENPORT. No. In the case of *Chisholm v. Georgia* (2d Dallas) a citizen of South Carolina, I think, had brought a suit against the State of Georgia, and the defense was made that you could not sue a sovereign State, and the Supreme Court of the United States in that case held that under the provisions of the Constitution as it then was you could sue the State, and it was that decision that led to the adoption of the eleventh amendment. The case of *Ware v. Hylton* was where a party owed a debt to a British subject before the breaking out of the Revolution, the debtor living in Virginia. Shortly after the Declaration of Independence the State of Virginia passed a sequestration act and also an act that was claimed to be a confiscatory act, and the debtor had, in pursuance of those laws, paid his debt into the public treasury of Virginia, and Virginia had taken that money and spent it. When the definitive treaty of peace between Great Britain and the United States was made there was a provision in it that there should be no legal impediment to the recovery by the British creditors of their debts from the citizens of the United States, and a suit was brought by the British creditor against his debtor in Virginia. John Marshall, then a practicing lawyer, appeared for the State of Virginia, and in behalf of the debtor also, to maintain the validity of those sequestration and confiscatory laws, and that they could not be affected by the treaty, and in the discussion of those questions this subject of the relations between the colonies during the Revolutionary war and Great Britain, singly and collectively, was involved; so that the chairman will find upon investigation that Mr. Justice Matthews's statement in the case of *Fitch & Co. v. Hopkins*, 118 U. S., which I have cited, is not only historically correct, but that it is a matter of vast legal import. The Declaration of Independence and the ensuing governmental legislative acts of the Continental Congress really were the Constitution of the American people up to 1781, when articles of confederation were finally adopted by the requisite number to make it effective; and when Mr. Lincoln in his Gettysburg address said, speaking in 1863, "four score and seven years ago our fathers brought forth upon this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal," it was historically and legally sound; and, as I say, I consider that that has great weight, as it affects the construction of the fifth amendment to the Constitution.

Mr. LITTLEFIELD. That as a matter of rhetoric would to a certain extent contraindicate the utterance of our great friend, Rufus Choate,

who referred to the Declaration of Independence as a mass of glittering generalities.

Mr. DAVENPORT. I know that he said that, and he said many other foolish things in his time. You must remember that the Declaration of Independence is saturated with nationality. It says:

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

Then, if you will remember, all through the Declaration of Independence, when they arraign the King of England for what he has done to them, they are all assumed to be acts done against the American people. He has done this, that, and the other "with our assemblies," and so forth. But to sum it all up, I say that the Declaration of Independence is saturated with the idea of nationality, and it would be a mistaken point of view, either historically or legally, to regard the Declaration of Independence as of no more significance than the declaration of a political party—a platform. It is an instrument of an entirely different character.

Mr. LITTLEFIELD. The Mecklenburg declaration was a precursor of the Declaration of Independence.

Mr. DAVENPORT. That, I believe, is a fake. But be that as it may, the Declaration of Independence is the title deed of American institutions.

Mr. LITTLEFIELD. Your idea is that that saturated the situation with the fundamental, inherent principles of natural justice, and that having produced that result the Constitution should be treated as likewise saturated with the same conditions.

Mr. DAVENPORT. Yes; It would be neither legally nor historically correct to separate the two. The Declaration of Independence when it was proclaimed was read at the head of the Army. It was read at every camp fire during the dark days of the Revolution. When they got pretty well discouraged Washington would have it brought out and read to the soldiers. Talk about your State conventions adopting and ratifying the Constitution—the constitutional convention ratifying it! Why, the whole American people put everything they had behind the Declaration of Independence for the purpose of making it good, and by their sacrifices and by their struggles they ratified and established that instrument as their fundamental law until they should see fit later to change it. The point, of course, that I seek to bring out, is that that document is fundamental to our institutions; the principles involved in it are fundamental. And while in 1777 the Congress proposed to the States to have a certain loose form of national government, the articles of confederation, adopted in 1781, which proved to be inadequate and unsatisfactory, and while later they proposed the Constitution of the United States, framed by the Constitutional Convention of 1787, which was ratified by the people of the several States in the following year, these were merely changes in the form of government. Those instruments were built upon and embodied the fundamental principles in the Declaration of Independence; and you will remember in this connection that Mr. Hamilton, in one of the early numbers of the Federalist,



perhaps the first number, said: "A nation without a national government is an awful spectacle."

I think there can be no doubt of the correctness of this position: and that being so, I think the position so ably maintained by the chairman of this committee, Mr. Littlefield, in his minority report on the employers' liability bill is that its merits is the same as that of the fourteenth amendment in this respect, that the true construction, probably, of the fifth amendment will ultimately prevail. In discussing the several propositions offered in relation to this subject it should ever be borne in mind that in all probability there will soon come in the progress of events a declaration by the Supreme Court of the United States directly to that effect upon that point; and that this proposed Hepburn bill and Mr. Smith's bill and all other bills which look to the exemption of certain classes of persons from the operation of the Sherman antitrust law, not based on a natural but on an artificial distinction, will fall, just as the classifications of that character made by the legislatures of the States in their statutes have fallen, and for the same reason.

On the question about the common law, I wanted to direct the attention of the committee to the case of the Western Union Telegraph Company *v.* Call Publishing Company (181 U. S.), commencing at page 100. The court said:

This court has often held that the full control over interstate commerce is vested in Congress, and that it can not be regulated by the States. It has also held that the inaction of Congress is indicative of its intentions that such interstate commerce shall be free, and many cases are cited by counsel for the telegraph company in which these propositions have been announced. Reference is also made to opinions in which it has been stated that there is no Federal common law different and distinct from the common law existing in the several States. Thus, in *Smith v. Alabama* (124 U. S., 465, 478), it was said by Mr. Justice Matthews, speaking for the court:

There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law, and subject to such alterations as may be provided by its own statutes. (*Wheaton v. Peters*, 8 Pet., 591.) A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co. v. Lockwood* (17 Wall., 357), where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of that State (p. 478).

Then the court continues as follows:

Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

And the court goes on to expatiate on that point, and they say that there are certain principles which by reason of their generality, and

as you may say, universality, of application, may be considered in connection with interstate transactions.

Of course the whole point of what I have been saying on that particular subject is this: I say you could not adopt this proposed Hepburn bill as it is provided in the sections that relate to what we may briefly call the "boycott," and things connected therewith, which Mr. Low says are independent of the other provisions of the statute and are intended to be substantive changes in the law—you could not, I say, adopt those and leave a party situated as Mr. Low was, and as almost everybody who does an interstate business is, any protection; because Congress having said that all contracts, combinations, and so forth, in restraint of trade, are illegal, but that certain other ones shall be in effect legal, that would be the declaration by the body having plenary and exclusive power over the subject and which declares what the law is on the subject; and if Mr. Low undertook to resort to the State court, or indeed the Federal court, if he brought a suit based on diversity of citizenship, he would be confronted with the difficulty that Congress had legalized the things which at common law were illegal.

Mr. LITTLEFIELD. And of which he complained?

Mr. DAVENPORT. And of which he complained. Of course the situation is entirely different now.

Mr. LITTLEFIELD. That is, unless he could establish that it was an unreasonable combination in restraint of trade.

Mr. DAVENPORT. No, that would not make any difference. These things I am speaking of are outside.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. There are two ways to stab this law to death. One is that concocted by the gentlemen who drew this bill, to put in the word "unreasonable" in the first section.

Mr. LITTLEFIELD. You cited your authorities and made yourself clear on that proposition, *quoad* its criminal features, but would that apply to the civil remedy under the statute with the same force? Do you think it would?

Mr. DAVENPORT. That brings me to a thought I think I had not approached.

Mr. LITTLEFIELD. Of course we know that the criminal pleading requires more definiteness than civil pleading.

Mr. DAVENPORT. You must remember that this statute is penal not only because it is criminal, but because it treats all the business subjected to it as a public nuisance. It confiscates all trust-made goods while in transit. The United States Government in proceeding against these parties does not proceed against them as if it were itself a person having any property rights or any interest in the matter, but in behalf of the public. It proceeds to destroy or control the evil by the equity branch of the Government—this thing which has been by the Supreme Court likened to a public nuisance. The Sherman Act is therefore penal for this reason. It is also penal in the provision for treble damages, except in so far as these gentlemen may succeed in destroying its effectiveness in that respect by reducing the damages from treble to single.

Mr. LITTLEFIELD. Is that question of damages its turning point on its penal character?

Mr. DAVENPORT. No; I say if——

Mr. LITTLEFIELD. Your idea is that all the remedies, whether civil or criminal, under the Sherman antitrust act are penal in their character?

Mr. DAVENPORT. Certainly. While, of course, it is to remedy a supposed great public evil, yet the act is penal in its character.

Mr. LITTLEFIELD. That is, the act that gives the civil remedy is the same act that makes them criminally liable, and when that falls down for any reason on the criminal side it also falls on the civil side, out of the same infirmity?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. The moment you import any language which weakens it into the criminal side of the statute, the civil side sounding on its criminal features is also rendered infirm; is that your idea?

Mr. DAVENPORT. They are all stabbed at the same blow by inserting the word "unreasonable" there.

Mr. LITTLEFIELD. Your idea is that that affects equally injuriously the civil remedy as it does the criminal one?

Mr. DAVENPORT. Certainly it does. I think that could be demonstrated.

Mr. LITTLEFIELD. You have no authorities on that specific point, though?

Mr. DAVENPORT. The very authorities which I have quoted.

Mr. LITTLEFIELD. But they were all relating to penal statutes and criminal offenses.

Mr. DAVENPORT. They were criminal, some of them.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. But the same doctrine is laid down there in them. An examination of those cases reveals the fact that whether you deprive a man of his freedom by the interposition of a court of equity—his freedom which he otherwise would possess—or whether you strip him of his property, whether it be by way of penalty or in any other way, or whether you expose him to criminal prosecution, running through those cases is this doctrine, that the statute is of a penal nature; and in order to subject a man to loss in any respect in consequence of them you have got to have that measure of definiteness which is applicable equally to the criminal and to the civil. Of course you can see how it would act. Suppose the United States resorted to its action in equity to restrain these people. You must remember that in that act there is a provision that every bit of property is confiscated in its passage from State to State. The Government can seize it. The subject-matter that is brought about by these combinations, or with which those combinations relate, is subject to confiscation by the Government, and I think it is not necessary for me to do anything further along those lines than to throw out that suggestion. But the question of the chairman brings to my mind a subject more or less cognate to it. I want to show you the destructive purpose—it must have been a purpose—of those who concocted this bill. I know that they say: "Why, we did not know about this, we did not understand it," etc., but that is almost too much for me to accept. I have no doubt that Mr. Low and Professor Jenks and Mr. Marburg had no conception of what was the precise effect of what was done.

**Mr. LITTLEFIELD.** They do not undertake to be responsible for the legal end of the proposed bill.

**Mr. DAVENPORT.** I understand not, and I could not impute to them anything; but when we see things done which have a definite effect to ruin this act, we can not believe but what there was back of it somewhere a concerted movement to bring about those results.

**Mr. LITTLEFIELD.** When we understand that eminent lawyers put the language into shape, we have a right to assume that they knew what they meant, I suppose.

**Mr. DAVENPORT.** The chairman asked me the other day if I could define the difference between a combination and a conspiracy. I think we would all agree that a combination to destroy and kill is a conspiracy, and I should look upon this performance as a conspiracy to destroy the rights of the individual by Congressional legislation in the interests of great combinations, both of labor and capital. Precisely what part one and another may have taken in it, I do not know. I have no doubt Casca was there, and Cassius, and we are told that Brutus was there, too, he whose sworn duty was to defend this law.

**Mr. LITTLEFIELD.** What we want to know is what is going to happen to Cæsar.

**Mr. DAVENPORT.** You know, when Mark Antony held up the mantle of Cæsar, he was able to say—I do not know how he was able to do it, because it is said that he was not there the day of the assassination, but he did say: "See what a rent the envious Casca made," and "In this place ran Cassius' dagger through," "Through this the well beloved Brutus stabbed; and as he pluck'd his cursed steel away mark how the blood of Cæsar follow'd it, as rushing out of doors, to be resolv'd if Brutus so unkindly knock'd, or no." I do not know that we can point out to you who did this particular thing or that, but we can show you who gets the benefit of it all, through the actual ruination of the Sherman Anti-Trust Act for all purposes! We may suppose that all the conspirators had a hand in it.

**Mr. LITTLEFIELD.** I want to get one clear illustration into the record so as to get your view of the law in relation to this question of the effect of the proposed legislation upon the common law rights of men situated as your clients were in the Danbury Hat Case. As I understand it, roughly speaking, the Danbury hat people sold in the State of Connecticut \$10,000 worth of their product, and throughout the country \$400,000 worth of their product. Under the provisions of the Sherman Anti-Trust Act you adequately alleged a boycott interstate in its character, by virtue of which they recovered. Let us assume for the purpose of illustration—I do not know what the facts may have been—that there were, say, a dozen or fifteen or a hundred or two hundred people in the State of Connecticut who among the others entered into a conspiracy to boycott the Danbury hat people in Connecticut, and then in order to make their attack upon the Danbury hat people more effective, they extended the boycott through the country, as alleged by you in your declaration. Of course, when a conspiracy is formed, any act done by any conspirator is one for which all the conspirators are responsible. The first matter on which I want you to make a statement is this. Of course the combination in Connecticut would be amenable there, assuming it to be a boycott. Why does it prove any less actionable, the Sherman Anti-Trust Act or the provisions of this bill to the contrary notwithstanding, if

in connection with that conspiracy they had other conspirators all through the country for the purpose not only of carrying out that conspiracy but a wider conspiracy of which the Connecticut conspiracy is the original or constituent part? Why could not your client bring an action against the Connecticut people and recover against them on the ground that these other acts were merely a part of their original conspiracy, and if harm was done the original conspirators were responsible for the act that was done? Do I make myself clear?

Mr. DAVENPORT. I think I catch your point. The trouble would be this—that we would have to count upon acts done which were unlawful. But Congress says they shall be lawful.

Mr. LITTLEFIELD. Yes; but the acts upon which you would count in the illustration I am giving you would be acts done in the first instance in Connecticut.

Mr. DAVENPORT. If the combination contemplated this interstate boycott, it does not make any difference whether it was entered into at the beginning or at a later stage.

Mr. LITTLEFIELD. If there was a combination in Connecticut in connection with the State business of the Danbury hat people, that was actionable; and if then, in addition to and in connection with and in pursuance of that same actionable conspiracy, without any reference whatever to the Sherman Anti-Trust Act, a further and more enlarged conspiracy was entered into which covered, for instance, the whole of the United States, the question, to my mind, is whether your clients could not recover upon the original conspiracy thus enlarged and thus spread all over the country.

Mr. DAVENPORT. I do not think it would make any difference.

Mr. LITTLEFIELD. I make my point clear, do I?

Mr. DAVENPORT. I think I understand it. The difficulty is that the acts for which we seek redress would be made lawful by the authority which alone can make them lawful.

Mr. LITTLEFIELD. To go back to the illustration; then, of course, your clients could recover of the people engaged in the lawful boycott in Connecticut, no matter what the Sherman Anti-Trust Act might say.

Mr. DAVENPORT. Yes; because that would be intrastate.

Mr. LITTLEFIELD. Yes; that would be intrastate, and while you might bring your action sounding on that conspiracy, the moment you undertook to show in the court that it had spread so that it had gotten to be interstate in its character, you would be met by the statement that that was not admissable—that you could not put it in as a part of your case. It would not be an aggravation of the original offense.

Mr. DAVENPORT. Not at all, because they would be doing something that they would be authorized by the supreme authority to do.

If that has been sufficiently elucidated, I want to call the attention of the chairman to a very large sized negro in this woodpile.

Mr. MARBURG. May I ask a question about that latter point?

Mr. DAVENPORT. Yes.

Mr. MARBURG. It is this, whether in your opinion this modification of the Sherman Antitrust Act which suspends the operation of the law in certain respects takes away certain remedies which the indi-

vidual would have under the common law in the State courts or under State statutes?

Mr. DAVENPORT. The questioner has in mind those provisions of the act which I was not now immediately considering. I say, and I want to put it before the committee in this connection, that if this proposed bill was adopted, if this language were adopted, the courts would necessarily construe it to be a legalization of the things that are excepted from the operation of the law.

Mr. MARBURG. That is the point.

Mr. DAVENPORT. Section 3 of the bill reads:

SEC. 3. That in any suit for damages under section seven of the said act approved July second, eighteen hundred and ninety, based upon a right of action accruing prior to the passage of this act, the plaintiff shall be entitled to recover only the damages by him sustained and the costs of suit, including a reasonable attorney's fee; and no suit for damages under said section of the said act, based upon a right of action accruing prior to the passage of this act, shall be maintained unless the same shall be commenced within one year after the passage of this act.

Nothing in said act approved July second, eighteen hundred and ninety, or in this act, is intended, nor shall any provision thereof hereafter be enforced, so as to interfere with or to restrict any right of employees to strike for any cause or to combine or to contract with each other or with employers for the purpose of peaceably obtaining from employers satisfactory terms for their labor or satisfactory conditions of employment, or so as to interfere with or to restrict any right of employers for any cause to discharge all or any of their employees or to combine or to contract with each other or with employees for the purpose of peaceably obtaining labor on satisfactory terms.

I hope later to point out to the committee that the courts would construe that to be a declaration by Congress that those things that are excepted are to be thereafter legal.

Mr. LITTLEFIELD. That, as near as I can understand it, is the purpose of the people behind the bill. That is what I understand they want.

Mr. DAVENPORT. Now, I say that these provisions would knock into a legal cocked hat the remedies as they exist now at common law as well as under the statute, because you know that now the law of God and the Sherman Act and the common law are all working together to prevent these things. Now, God may forbid this business, and the State may forbid it, but there is a body, Congress, between the two which can lay down the law that these things shall be legal.

Mr. LITTLEFIELD. That is, this bill specifically authorizes the things that your Danbury Hat Case was predicated upon, because that was a peaceable boycott.

Mr. DAVENPORT. Yes.

Mr. MARBURG. Was there no remedy against a boycott, interstate, before the original Sherman law?

Mr. DAVENPORT. There was, and there is to-day.

Mr. MARBURG. Does not this provision which says: "Nothing in this act referring to the Sherman Act," or "in this act," simply suspend the operation of the Sherman law?

Mr. DAVENPORT. I do not so construe it. I can not conceive of a court construing that act any other way than by saying: "Now, we have full control over this subject and we are legislating"——

Mr. LITTLEFIELD. Your point is, while this language may be drawn for accomplishing that purpose, it really goes further.

Mr. DAVENPORT. Yes, and the principles laid down in the cases I have cited, where the court holds that what Congress says shall be done and what shall not be done in fact covers the whole subject. The cases beginning with the case of *Gibbons v. Ogden* and running down to the present time are all to this effect.

Mr. MARBURG. Would you permit this being put in while that point is being discussed? This is a letter of the assistant solicitor-general.

Mr. DAVENPORT. No; I do not want it in here. If he wants to say anything, let him come here and say it, or put it in later.

Mr. LITTLEFIELD. You do not want to be understood as saying that there was any criminal remedy for interstate offenses before the Sherman antitrust act was passed?

Mr. DAVENPORT. No.

Mr. LITTLEFIELD. What remedies to you refer to, then?

Mr. DAVENPORT. I am speaking about the right of the party to maintain an action for damages.

Mr. LITTLEFIELD. An action at common law?

Mr. DAVENPORT. Or an action in equity. It would present a very interesting situation if a man walked up to the court and said, "Here, I want to have these people enjoined from this," referring to something that an act of Congress says they may do. A man might proceed on his common-law rights, formerly.

Mr. LITTLEFIELD. And then the Sherman antitrust act came in?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. And that made an entire change in the situation?

Mr. DAVENPORT. It did not interfere with it at all.

Mr. LITTLEFIELD. No; but it created a new tribunal.

Mr. DAVENPORT. Yes; an extra one.

Mr. LITTLEFIELD. And it exercised a power under the commerce clause that had not been exercised.

Mr. DAVENPORT. Yes; that is precisely the position we took in the Buck case.

Mr. LITTLEFIELD. Yes; the Buck case was a case of a peaceable boycott?

Mr. DAVENPORT. Yes. We said: "Here are the facts," and when we came to argue the case we said: "These acts are unlawful, and we want the court to enjoin them. They are unlawful for three reasons. One is that it is a lying, malicious attempt to ruin a man's business. The other is that it is forbidden by the statutes of the United States and that it is therefore unlawful, and that it is also unlawful at the common law." When a party's business is threatened by acts which are unlawful, threatened with injury, he can resort to a court of law or a court of equity for protection; that is, for threatened injury he can resort to a court of equity. So we asked Justice Gould to enjoin them for these several reasons.

Mr. LITTLEFIELD. Where a party is threatened with harm for which there is no adequate remedy at law?

Mr. DAVENPORT. Yes. When Judge Gould passed on this case he did not say a word about the Sherman antitrust act; he passed that over. He said: "The acts are unlawful at common law, and you are entitled to that redress." Of course, since that time the decree in the Buck case has been made permanent. Now the Supreme Court of the United States, in the *Loewe* case, has held that this kind of busi-

ness is unlawful at common law, and also forbidden by the Sherman antitrust act. But let us return to our subject a little closer.

Mr. EMERY. It has been asserted that the term "any right therein contained" was to legalize a right that had been previously ascertained and interpreted.

Mr. DAVENPORT. What of that?

Mr. EMERY. That is referred to in that way.

Mr. DAVENPORT. Suppose it is. That is not tenable.

Mr. LITTLEFIELD. Your contention is that the particular language is confined to some specific condition?

Mr. EMERY. That it will not interfere with any right to strike for any cause; that the word "any" was put in there for the purpose of limiting the right to a right that has previously been determined and adjudicated.

Mr. LITTLEFIELD. You mean that the act does not mean what it says it means?

Mr. EMERY. They use the word "every" in the first section.

Mr. DAVENPORT. The substantive provisions of the Sherman Anti-Trust Act are to be preserved except so far as they are modified by these sections of the proposed bill. The first object in the proposed bill is to tie up the hands of the United States Government so that the proceedings in equity under it are to be limited in that direction in such a way as to make it practically impossible of any enforcement. They also reduce the treble damages to single damages. But as I have explained heretofore, they have not interfered with such rights in equity, as the party may have to go into a court of equity and restrain any injury that may be threatened by any violation of the first provision of the bill. We must bear in mind all the while, in considering this matter, that it is not proposed by this bill to amend the first section of this Sherman Act by writing in there the word "unreasonable," or by saying "any contract or combination that the Commissioner of Corporations deems unreasonable." That first section of the Sherman Act is to be preserved. It is to be preserved exactly as it stands to-day, except as it is modified by the provisions that I have been referring to last. Now, where does that leave the party? He has got to confine himself to his single damages under that provision as amended. There has been no subject more carefully considered by Congress.

Mr. LITTLEFIELD. That expression excludes the punitive and exemplary damages, a thing that universally prevails in every other jurisdiction?

Mr. DAVENPORT. Yes; and not only that, but what explanation was made for this proposed modification? Prof. Jenks, who says that he has incidentally acquired some knowledge of the law, says that he thinks men may be spiteful nowadays, and may use the Sherman Act to oppress people. What was the object of putting that provision in the law, anyway? This Judiciary Committee in past years has pondered over this subject a great deal, and at one time it reported a measure to the House providing that they could recover not less than \$250. Two hundred and fifty dollars was to be the minimum, and that could be multiplied by three. The Judiciary Committee of the House recommended the passage of an amendment to the law of that kind. The explanation when this treble damage feature was put into the bill originally was that it was preposterous



to suppose that an individual who might be injured by these great combinations to the extent only of a few dollars could go all over the United States for the purpose of collecting testimony and hiring lawyers for the purpose of tackling the Sugar Trust or the Standard Oil Trust, or any other great combination, when he was to be content with single damages. The absolute necessity, if this provision was to be of any value whatever, either as discouraging trusts or protecting people who were victims of trusts, of having the feature in there of punitive damages, treble damages, was manifest. It was felt that it must necessarily have that feature, and Senator George pointed it out very clearly. And when this Judiciary Committee of the House reported in 1900 in favor of this amendment as suggested by the bill of Mr. Littlefield, they set forth the reasons why it was absolutely necessary—if you were going to afford any protection whatever to the parties injured—that there should be a minimum, and they thought \$250 was a small enough amount of damages to be recovered by a party affected in that way privately. The purpose of putting this in the law was to enable the party to be sure that he was recovering something adequate, considering the great expense he was to go to, and the difficulty of proving his actual damages; and I say that every time this matter of changing the law about treble damages has come up, the position taken by Congress has been that, instead of weakening this provision about treble damages, it should be strengthened. Such a bill passed Congress, did it not?

Mr. LITTLEFIELD. It passed the House.

Mr. DAVENPORT. Yes, it passed the House. And it took the position that the private party should be entitled to recover at least \$250. So far as Professor Jenks is concerned, I do not suppose that he really appreciates what sort of a practical nullification of those provisions of the Sherman Anti-Trust Act would be accomplished by this provision of the proposed bill. You might just as well take away altogether the right of the party to bring suit for his damages if you reduced the possibility of his recovery to single damages. That was the consensus of opinion of the Senators and Representatives when the Sherman Anti-Trust Act was pending. It has been repeatedly said by this committee. One excellent report is that of Mr. Overstreet on the bill of Mr. Littlefield, and friends and enemies of the trusts in Congress have repeatedly asserted not only the justice but the necessity of the provision for treble damages in the law. But how about the equitable remedy of the party?

Mr. LITTLEFIELD. I was going to suggest the fact that the court has the power to issue an injunction to restrain the carrying on of a combination of this kind. It was predicated upon the theory that the plaintiff has an inadequate remedy at law.

Mr. DAVENPORT. Practically, what relief has he? I recall to your mind sections 737, 738, and 739 of the Revised Statutes, and the act of 1875 and the act of 1887, relative to the jurisdiction of the United States courts. Why was the provision put into this act, on the motion of Senator Spooner, providing that the process of the United States should run into all the districts, bringing people from all over the United States under the jurisdiction of a particular court? It was for this reason: You know that under the laws defining the jurisdiction of these courts a party who seeks his remedy in equity can only sue a party in the district where the latter resides. It is only in

cases where the right of action in equity is based upon a diversity of citizenship solely that the party is permitted to sue in the district where he resides.

Mr. LITTLEFIELD. He is permitted to sue the defendant where the defendant resides.

Mr. DAVENPORT. And in the cases where it is based solely upon diversity of citizenship he can sue the defendant in the district where the plaintiff resides, provided he can catch him there.

Mr. LITTLEFIELD. Oh, yes.

Mr. DAVENPORT. But in every other case, which would be such a case as this, he would have to resort to the district where the defendant resides, and if there is more than one defendant, and there are defendants in other districts, he has got to leave the others all out. It is a restriction upon the jurisdiction of the suits in equity brought by a private party. He can only sue the party in the district where the defendant resides, and if the defendants are scattered all over the United States he can only proceed against the one that he can catch, and under the provisions of the sections that I refer, it is expressly provided that the judgment rendered shall not affect any defendant who is not within the jurisdiction of the court.

Mr. LITTLEFIELD. And not served?

Mr. DAVENPORT. The only exception is, of course, where it is an action affecting real estate, and the real estate is in the district, and there is some lien upon it to be enforced, or there is some cloud upon the title, in which case there is a provision for constructive notice to the party, which binds that *res*; but it is expressly provided that the judgment shall not be binding upon the absent party not served.

Mr. LITTLEFIELD. That makes the matter *in rem* as distinguished from *in personam*.

Mr. DAVENPORT. Now, look at the situation we are in. We can not sue this multitude of people scattered all over the United States in any single court of the United States. We can only select Tom, Dick, or Harry in one district, and the decree of the court in equity would only bind them. We were able to come to the court in the District of Columbia because the supreme court of the District of Columbia, as you know, is a court of general jurisdiction, and if you could catch the defendants here you could serve them, and the court could get jurisdiction, the same as they could in a court of general jurisdiction in a State. It has not those limitations that exist in regard to circuit courts of the United States, and we fortunately were able to get service here in the District of Columbia upon Mr. Gompers and the other members of the executive council, they being in session here, and that gave that court jurisdiction. But unless you preserve the right of the United States Government as it exists in the Sherman Act to-day to proceed in equity against these giant combinations, either of capital or labor, who desire to and do in point of fact break the laws of the United States, you are practically ruining the remedy. So say I, the provisions of this bill proposing a reduction from treble to single damages, and proposing to tie up the hands of the Federal Government in its right to proceed against these people, rob the party injured of all practical remedy, and I say that that is ruinous to the principal features of the Sherman Anti-Trust Act. That is the effect so far as that is concerned.

Mr. LITTLEFIELD. You made a suggestion the other day about the effect upon litigation such as you now have pending in the District of Columbia; that is, the effect that this bill had upon the right to recover in the District of Columbia.

Mr. DAVENPORT. When we adjourned on Saturday I was speaking about the devastation that this act would work in the law as to the District of Columbia. I had called the attention of the committee to the fact that under the common law as it existed in the District of Columbia in 1886 the Supreme Court of the United States had held that a combination to boycott was a criminal conspiracy at common law, and a heinous offense, and of course unlawful and criminal in all its aspects. Then came along the Sherman Anti-Trust Act, which by its provisions covers the District of Columbia, and operates upon that very matter, and makes a further criminal penalty for doing the things that are provided against. If you amend the act as it is proposed to do here, you wipe out at once, of course, the law as it relates to the District of Columbia, for the language here reads:

Nothing in said act approved July second, eighteen hundred and ninety, or in this act, nor shall any provision thereof be enforced, so as to interfere with or to restrict any right of employees to strike for any cause or to combine or to contract with each other or with employers for the purpose of peaceably obtaining from employers satisfactory terms for their labor or satisfactory conditions of employment, or so as to interfere with or to restrict any right of employers for any cause to discharge all or any of their employees or to combine or to contract with each other or with employees for the purpose of peaceably obtaining labor on satisfactory terms.

Bearing in mind the allegations of the information in the case of Callan v. Wilson (127 U. S.), which I read to the committee on Saturday, you will see that that conspiracy is entirely legalized. Nothing was done by those gentlemen in that case but what is covered by what they are permitted by this proposed bill to do.

Mr. LITTLEFIELD. Your theory that that act permits it by exempting them from it in this connection must be referred to a little different proposition from that which you have been discussing, which has been the power exercised by Congress under the commerce clause, because now you get into the common law jurisdiction.

Mr. DAVENPORT. This is not under the commerce clause.

Mr. LITTLEFIELD. That is under the common law jurisdiction of the District of Columbia.

Mr. DAVENPORT. Yes. The Constitution provides that Congress shall exercise exclusive legislative authority in the District. The language is that they have the absolute power.

Mr. LITTLEFIELD. I understand that perfectly; they exercise the same power that a State exercises.

Mr. DAVENPORT. Yes. You must remember that the Sherman Anti-Trust Act applies here.

Mr. LITTLEFIELD. Applies to the District of Columbia?

Mr. DAVENPORT. Yes, certain sections of it; and those sections remain, and this proviso comes along, to the effect that nothing in the act approved July 2, 1890, or in this act, is intended, nor shall any provisions thereof hereafter be enforced; so that the provisions of the Sherman Anti-Trust Act which relate to the District of Columbia forbidding these things are by this act repealed.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. Or they are modified in such a way that those very things which are forbidden at the common law are made legal.

Mr. LITTLEFIELD. It is provided that the inhibitions of the Sherman Anti-Trust Act do not apply, but your idea is that the negative language of this section is affirmative in its operation. Instead of simply exempting them from the operation of the statute, they are affirmative declarations that the acts referred to are authorized.

Mr. DAVENPORT. We have the statute right here. You must remember that these gentlemen do not repeal the act; they amend it. Section 3 of the act reads:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court.

This proposed section 3 in the bill reads:

Nothing in said act approved July second, eighteen hundred and ninety, or in this act, nor shall any provision thereof hereafter be enforced, so as to interfere with or to restrict any right of employees to strike—

or to do all these things that they did in that case of *Callan v. Wilson*. So I say, so far as the criminal law is concerned in the District of Columbia, if you adopted this bill in the way it is proposed, you would tear up by the roots the whole criminal law of the District of Columbia pertaining to this subject.

Mr. LITTLEFIELD. Prior to the passage of the Sherman anti-trust act the criminal law, the common law, obtained in the District of Columbia and prohibited a boycott or a criminal conspiracy.

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. The moment the Sherman anti-trust act came into operation in the District of Columbia that suspended the operation of the common law.

Mr. DAVENPORT. Not exactly.

Mr. LITTLEFIELD. What is your proposition about that?

Mr. DAVENPORT. It overlaid it.

Mr. LITTLEFIELD. Well, it overlaid it. The moment you repeal the Sherman anti-trust act—

Mr. DAVENPORT. You do not repeal it.

Mr. LITTLEFIELD. The moment you suspend its operation, then—

Mr. DAVENPORT. You do not suspend it.

Mr. LITTLEFIELD. What do you do?

Mr. DAVENPORT. You say that these things shall be legal.

Mr. LITTLEFIELD. No, you do not.

Mr. DAVENPORT. How else can you construe that?

Mr. LITTLEFIELD. It says it shall not apply to those things, but it does not say in terms that they shall be legal. Your proposition is that while this language is negative in its character, it is affirmative in its effect. Is that your proposition?

Mr. DAVENPORT. Why, so far as this amendment is concerned. That language commencing on line 24, at the bottom of page 7, and

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Mr. DAVENPORT. Why, so far as this amendment is concerned. That language commencing on line 24, at the bottom of page 7, and

running to the end of section 3, is to be written right into this law, so that it would read——

Mr. LITTLEFIELD. That is true, but in that case it undertakes to operate as an exception to the operation of that law; that is, the provision of the act undertakes to operate as an exception. Your proposition is that while it is negative, or is stated as an exception, it is really permissive.

Mr. DAVENPORT. Yes, and I say the effect of it is that it does legalize it.

Mr. LITTLEFIELD. That is another way of stating that same proposition.

Mr. DAVENPORT. Suppose a person was indicted for that offense.

Mr. LITTLEFIELD. Suppose a person was indicted for that offense?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. If he was indicted under the common law, that would be one thing, but if he was indicted under the Sherman Anti-Trust Act, that would be another thing. If he was indicted under the common law would the Sherman anti-trust law step in and supersede the common law?

Mr. DAVENPORT. Yes, it would suspend the operation.

Mr. LITTLEFIELD. Very well; suppose the Sherman Anti-Trust Act *quoad* the criminal law was repealed. What would you have, the common law?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. Suppose you suspend the operation of the Sherman Anti-Trust Act *quoad* the District of Columbia, what would you have, the operation of the common law?

Mr. DAVENPORT. I suppose the effect of that would be to repeal——

Mr. LITTLEFIELD. Let us go a little further. This act undertakes, on its face, at any rate, to exempt these parties from the operation of the Sherman Anti-Trust Act in the District of Columbia. Why is not that equivalent to a suspending of the operation of the Sherman Anti-Trust Act *quoad* the District of Columbia, as to these people?

Mr. DAVENPORT. You assume in that statement that the natural construction of this language is that the Sherman Anti-Trust Act in respect to these matters shall not be held to apply to the District of Columbia.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. That is not it at all. There stands on the statute book the law, and it writes in there after this section these words.

Mr. LITTLEFIELD. An exception?

Mr. DAVENPORT. An exception.

Mr. LITTLEFIELD. Certainly, it writes in an an exception. But your proposition is that while that on its face is an exception, it goes further than that, and instead of relieving them from the affirmative provisions of a statute and relegating them to the common law, the exception permits them to do the things that otherwise it would be unlawful to do?

Mr. DAVENPORT. It does.

Mr. LITTLEFIELD. That is your proposition?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. The bill on its face does not undertake to do that, but your idea is——

Mr. DAVENPORT. I must most respectfully disagree with that.

Mr. LITTLEFIELD. The bill in terms does not undertake to do that.

Mr. DAVENPORT. What else does it undertake to do?

Mr. LITTLEFIELD. Your proposition is that the construction of the whole of the section results in that conclusion?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. Now, I will hear you on that; or perhaps you have gotten through on that.

Mr. DAVENPORT. I have stated the proposition, and the results are apparent.

Mr. LITTLEFIELD. That depends a great deal on the construction you put on the language.

Mr. DAVENPORT. I assume that as the courts construe statutes, that would be construed to be precisely what was the intent of Congress. What are they doing; what are they making such an exception for? Here is a law that prohibits contracts in restraint of trade in the District of Columbia, combinations and conspiracies in restraint of trade in the District of Columbia, and they say that shall not apply any longer to conspiracies of the kind we have been talking about; it shall relate only to conspiracies in regard to combinations of capital, for instance. I say that the necessary, common sense, legal effect of that provision is to legitimize in the District of Columbia those things which were forbidden by the common law prior to the enactment of the Sherman Antitrust Act, and which are forbidden by the Sherman Antitrust Act. Why do they make the exception, except to protect them?

Mr. LITTLEFIELD. Your proposition is that if the exception only operates to remove the inhibition of the Sherman Anti-Trust Act, which would allow the operation of the common law, which would make the same things criminal under the same circumstances, the exception does not accomplish anything?

Mr. DAVENPORT. Certainly.

Mr. LITTLEFIELD. And the inference is that Congress intended to do something?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. And then you go further and say that the gentlemen using this language must have had some intelligent purpose in their minds when they used it.

Mr. DAVENPORT. Yes, I assume so.

Mr. LITTLEFIELD. And the only intelligent purpose is to authorize what on its face seems to be an exception.

Mr. DAVENPORT. It does not seem possible that these distinguished gentlemen, the names of some of whom we have heard, while the names of others they have refused to tell us, but who are referred to by the Secretary of Commerce and Labor as most eminent men, thoroughly competent to undertake the task which they essayed—I read a statement of that kind in a speech made by Mr. Smith over in Philadelphia the other night, in which he said that this is a masterpiece—did not have this purpose in mind. We must assume that these gentlemen had this in mind, and the act must have been before them with its many provisions—with its several provisions; there are not many of them, either.

Mr. EMERY. The precise statement was that they were thoughtful and intelligent men, well equipped for the task.



Mr. LITTLEFIELD. He did not use the language that the bill was a "masterpiece?"

Mr. EMERY. I am quoting from the Philadelphia Ledger; it was in defense of this.

Mr. DAVENPORT. There are so many of these things that I want to talk about that I must revert to this subject of what kind of a power it is that is vested in this Commissioner, or whatever tribunal is to be substituted for the Commissioner. The mind lingers on that. So far as relates to the action of the Commissioner passing upon the reasonableness of the contract that is submitted to him, to go on, as to its future operation, I am very clear in my mind that that is a legislative act.

Mr. LITTLEFIELD. Right there, this same thing has been lodging in my mind. Is there a profound distinction between a reasonable rate predicated of a public-service corporation as to which the State has the entire control, which is exercised by virtue of the sovereignty of the State over the corporation of its creation and by virtue of the further fact that the corporation does exercise a part of the sovereignty, thus giving the State the right to regulate the contract, or is there not a profound difference between a reasonable rate under those circumstances and the reasonable price that the ordinary man engaged in business or commerce charges for his product?

Mr. DAVENPORT. Absolutely.

Mr. LITTLEFIELD. The question is whether that consideration affects this proposition you now have in your mind.

Mr. DAVENPORT. But I must respectfully submit to the chairman of the committee that the power of Congress and the power of the State to regulate charges of people engaged in a public employment is not derived from the power to charter and create the instrumentality, but it arises from the nature of the occupation.

Mr. LITTLEFIELD. It arises from the fact that the corporation exercises partial sovereignty, or some of the governmental powers.

Mr. DAVENPORT. No. There is a case in 93 U. S. where that precise question was argued and settled by the Supreme Court. In that case there were people, individuals, engaged in the handling of grain at warehouses, and the State of Illinois fixed the charges for the services, and it was contended that they had not any power to do it, and the Supreme Court of the United States, speaking by Mr. Justice Waite, laid down the proposition that wherever a person was engaged in a public employment, charged with a public service, like an inn-keeper—

Mr. LITTLEFIELD. Or like a common carrier.

Mr. DAVENPORT. Or like a common carrier, it was not the fact that he was chartered by the State, but it was the fact of the employment to which he devoted his property; and they held that the act was constitutional, and even went so far in that case as to intimate that the courts could not review it; but they receded from that very speedily when it came to the question whether the action was confiscatory.

Mr. LITTLEFIELD. That proceeds on an entirely different hypothesis, whether the rate was confiscatory.

Mr. DAVENPORT. The power to regulate commerce between the States does not rest upon any such distinction as that they are a corporation or anything else, it is because they are engaged in inter-

state commerce; and the Congress has no more power to regulate the commerce that is concerned in transportation than it has to regulate any other kind of interstate commerce. The power is plenary, the power to regulate, which the Supreme Court has said is the power to lay down the rule by which it shall be conducted, and applies to all kinds of interstate commerce, by whomsoever carried on, and it is applied to railroads particularly, because that is a most important branch of interstate commerce; but they have got the same power over people engaged in interstate commerce who buy and sell and deal in other States that they have over the transportation companies.

Mr. LITTLEFIELD. So far as the act relates to interstate commerce itself.

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. What do you say about the proposition that the State has the power to regulate the price?

Mr. DAVENPORT. It has not any.

Mr. LITTLEFIELD. Outside of these corporations that are quasi-public.

Mr. DAVENPORT. It has not any, as I will proceed to show.

Mr. LITTLEFIELD. Does not this bill here contemplate that in the last analysis?

Mr. DAVENPORT. It does; and I want to show the committee some authorities on some of the aspects of the case. We were talking about these questions that are germane—about what the nature of this power is?

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. As I said, so far as passing upon the reasonableness of these contracts that have a future action, and the reasonableness of that action in the future, is concerned, that is a legislative power, I think. But now we have another problem—namely, whether the determination does come under the provisions of this law. The language of the act is, first, that upon doing certain things the party is entitled to register. Having been registered, he can be taken off the roll by the action of the Commissioner or the President. I think it is by the Commissioner, by the concurrence of the Secretary of Commerce and Labor, as the bill was originally drawn. In case the Commissioner of Corporations acts arbitrarily, or injuriously, or unfairly, the party is in some way to have the right of review by the supreme court of the District of Columbia; and the question occurs at once, What is that power which the Commissioner exercises in striking his name off the roll. Is that a judicial power? Is that an executive or an administrative act? If so, can any court take any jurisdiction over the matter? Can power be conferred upon a court looking to a review of such a matter as that?

Mr. LITTLEFIELD. If the power is executive in its character or legislative?

Mr. DAVENPORT. Whatever name you give to that, it is not possibly legislative in that respect; it is the determination whether a man's name shall be on a roll or shall be removed from that roll. There is nothing legislative about that proposition, as I understand it.

Mr. LITTLEFIELD. Your question is whether it is executive or judicial?

Mr. DAVENPORT. Whatever that power is, can you protect the poor victim of this new-fangled method of dealing with his rights by going to any court? This act contemplates the review by some court to protect him in them. That idea runs through the bill. I want to call your attention to the case of the Interstate Commerce Commission *v. Brimson* (154 U. S., 447) and some of the general principles involved in it. But before I go to that, I want to call the attention of the committee to the case of *In re Pacific Railway Commission* (32 Fed. Rep.), commencing on page 241, where Mr. Justice Field presided. I want to direct the attention of the committee to the impossibility of lodging in a court the power of reviewing any such act as it is contemplated that this official shall perform, and in that connection I want to read a little, as apropos of what the chairman alluded to here a moment ago. I read from page 259:

SAWYER, *Circuit Judge* (concurring).

I fully concur in the reasoning of the circuit justice, and the conclusions reached, but I deem it proper to present some further views in support of our decision.

It is necessary to understand the exact legal relation of the Central Pacific Railroad Company to the United States in order to correctly appreciate the constitutional powers of Congress, and of the commission acting under its authority, over it. The Central Pacific Railroad Company is a private corporation, created and existing under the laws of the State of California. It derived none of its corporate faculties, or franchises, from the United States. It is in no way subject to regulation, as an instrument of foreign, or interstate commerce, or their authority to establish post-roads, or their war powers, in pursuance of the constitutional provisions on the subject, or such regulation as is authorized by the terms of the contract found in the acts of Congress of 1862 and 1864, accepted by the railroad company as a contract. The Central Pacific Railroad Company is simply an artificial person, created with certain faculties by the State of California, and it stands in relation to the United States, within the scope of its faculties, in precisely the same situation as a natural person under like circumstances.

It is important to bear this in mind through all the consideration of this matter, that intrinsically there is no distinction between private persons and corporations, associations, and combinations, whether with capital stock or without capital stock, whether for profit or otherwise, in respect to the matter of restraint of commerce between the States, which is forbidden by the substantive provisions of this act. Reverting now to the case where the opinion was given by Mr. Justice Field, I read first from the syllabus, at page 241:

1. Constitutional law—Judicial powers—Pacific Railway Commission.

The Pacific Railway Commission is not a judicial body, and possesses no judicial powers under the act of Congress of March 3, 1887, creating it, and can determine no rights of the Government, or the corporations whose affairs it is appointed to investigate.

2. Same—Power of Congress—Production of private papers.

Congress can not compel the production of private books and papers of citizens for its inspection, except in the course of judicial proceedings, or in suits instituted for that purpose, and then only upon averments that its rights in some way depend upon evidence therein contained.

This idea that is embodied in this bill of course is that same heresy that seems to find lodgment in the executive mind at the present time, that Congress can exact a license from a corporation before it can do interstate business, and as a condition of that license can require of it that it shall show its hand, contribute to that publicity which is the favorite topic and most loved idea of the gentlemen who are initiating this kind of legislation.

Mr. LITTLEFIELD. And it must be a very important proposition.

Mr. DAVENPORT. Very; quite true.

Mr. LITTLEFIELD. That all comes right down to the question whether Congress has power to impose conditions upon the people so engaged in interstate commerce, without relation to the question whether the conditions relate to interstate commerce.

Mr. DAVENPORT. Yes, and further than that, whether they can impose such conditions upon their right to engage in interstate commerce.

Mr. LITTLEFIELD. That is the same thing; whether they can impose conditions upon their right to engage in or continue in interstate commerce.

Mr. DAVENPORT. That is it.

Mr. LITTLEFIELD. Because they engage in or continue in as distinguished from conditions that relate to the interstate commerce conditions. That is the distinction laid down in the Howard case.

Mr. DAVENPORT. I will read further from this syllabus:

4. Constitutional law—Power of Congress—Investigation by Commission.

Congress can not empower a commission to investigate the private affairs, books, and papers of the officers and employees of corporations indebted to the Government, as to their relations to other companies with which such corporations have had dealings, except so far as such officers and employees are willing to submit the same for inspection; and the investigation of the Pacific Railway Commission into the affairs of officers and employees of the Pacific Railway companies under the act of March 3, 1887, is limited to that extent.

6. Same—Judicial powers.

The judicial power of the United States is limited to "cases" and "controversies" enumerated in article 3, paragraph 1, Constitution, as modified by the eleventh amendment, and to petitions on habeas corpus, and can not be extended by Congress; and by such "cases" and "controversies" are meant the claims of litigants brought for determination by regular judicial proceedings established by law or custom.

7. Same—Legislative power—Investigations—Courts.

The judicial department is independent of the legislative, in the Federal Government, and Congress can not make the courts its instruments in conducting mere legislative investigations.

Mr. Justice Field, presiding over this court as circuit justice, speaks as follows:

Impressed with the gravity of the questions presented, we have given to them all the consideration in our power. The Pacific Railway Commission, created under the act of Congress of March 3, 1887, is not a judicial body.

I take it that no one would contend that this gentleman having this power is a court. No one would contend that the Commissioner of Corporations is a court. Of course, he could not be a court under the provisions of the Constitution, because he does not hold office for life, and so forth.

Mr. MARBURG. May I ask whether Mr. Davenport heard our statement that it was proposed to change to the Interstate Commerce Commission?

Mr. LITTLEFIELD. They have gone back to the Commissioner of Corporations now. The proponents of the bill have returned to the Commissioner of Corporations.

Mr. MARTIN. Did I understand Mr. Davenport to state that Congress had not the power to order the production of books and papers for the enlightenment of its committees?

Mr. DAVENPORT. I have certainly not advanced any such proposition as that. I was reading the syllabus of this case. I have here the case of the Interstate Commerce Commission *v.* Brimson, where the very propositions laid down here are approved and distinguished.

Mr. LITTLEFIELD. Of course, it depends a great deal on the conditions. The general proposition is that Congress has not the power to compel anybody to produce books and papers. There are some lines of investigation where they have the power, and there are others where they have not the power.

Mr. DAVENPORT. I have read to you from this decision which is quoted with approbation in the case of Interstate Commerce Commission *v.* Brimson.

Mr. LITTLEFIELD. They stated that under certain circumstances the Railway Commission had not power to compel the production of books and papers?

Mr. MARTIN. Did not they also state that Congress could not do that?

Mr. DAVENPORT. For what purpose?

Mr. MARTIN. For the purpose of investigation.

Mr. DAVENPORT. They say "except so far as they are willing to submit the same for inspection," subject to the right to be exempted from all consequences of prosecution. But that is all covered in this case. I quote now further from the decision, at page 249:

The Pacific Railway Commission, created under the act of Congress of March 3, 1887, is not a judicial body; it possesses no judicial powers; it can determine no rights of the Government or of the companies whose affairs it investigates. Those rights will remain the subject of judicial inquiry and determination as fully as though the commission had never been created, and in such inquiry its report to the President of its action will not be even admissible as evidence of any of the matters investigated. It is a mere board of inquiry, directed to obtain information upon certain matters and report the result of its investigations to the President, who is to lay the same before Congress. In the progress of its investigations, and in the furtherance of them, it is in terms authorized to invoke the aid of the courts of the United States in requiring the attendance and testimony of witnesses, and the production of books, papers, and documents. And the act provides that the circuit or district court of the United States, within the jurisdiction of which the inquiry of the commission is had, in case of contumacy or refusal of any person to obey a subpoena to him, may issue an order requiring such person to appear before the commissioners and produce books and papers and give evidence touching the matters in question.

The investigation directed is to be distinguished from the inquiries authorized upon taking the census. The constitution provides for an enumeration of the inhabitants of the States at regular periods, in order to furnish a basis for the apportionment of Representatives, and, in connection with the ascertainment of the number of inhabitants, the act of Congress provides for certain inquiries as to their age, birth, marriage, occupation, and respecting some other matters of general interest, and for a refusal of anyone to answer them a small penalty is imposed. (Rev. St., par. 2171.) There is no attempt in such inquiries to pry into the private affairs and papers of anyone, nor are the courts called upon to enforce answers to them. Similar inquiries usually accompany the taking of a census of every country, and are not deemed to encroach upon the rights of the citizen. And in addition to the inquiries usually accompanying the taking of a census there is no doubt that Congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess. It may inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business, and even amusements of the people. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. In the pursuit of knowledge it can not compel the production of the private books and papers of the citizen for its inspection, except in the progress of judicial proceedings

or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence those books and papers contain.

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also, in certain cases, for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained and their contents made known against the will of the owners.

In the recent case of *Boyd v. U. S.* (116 U. S., 616; 6 Sup. Ct. Rep., 524) the Supreme Court held that a provision of a law of Congress, which authorized a court of the United States in revenue cases, on motion of the Government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or that the allegations of the attorney respecting them should be taken as confessed, was unconstitutional and void as applied to suits for penalties or to establish a forfeiture of the party's goods. The court, speaking by Mr. Justice Bradley, said:

"Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power; but it can not abide the pure atmosphere of political liberty and personal freedom."

The language thus used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, but it is applicable to any such production of the private books and papers of a party otherwise than in the course of judicial proceedings, or a direct suit for that purpose. It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial process or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans.

In his opinion in the celebrated case of *Entick v. Carrington*, reported at length in 19 How., State Tr., 1029, Lord Camden said:

Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye can not, by the laws of England, be guilty of a trespass, yet, where papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer there is none; and therefore it is too much for us without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

Compulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry, is as subversive of "all the comforts of society" as their seizure under the general warrant condemned in that case. The principles laid down in the opinion of Lord Camden, said the Supreme Court of the United States, "affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court with its adventitious circumstances; they apply to all invasions on the part of the government, and its employees, of the sanctity of man's home and the privacies of life."

In *Kilbourn v. Thompson* (103 U. S., 168) we have a decision of the Supreme Court of the United States that neither House of Congress has the power to make inquiries into the private affairs of the citizen; that is, to compel exposure of such affairs.

Now, you get the kind of information in its constitutional aspect that this Commissioner is to be charged with procuring from these people. There is no appeal contemplated from the refusal to admit them on the roll, but Mr. Low had some idea that inasmuch as the

language of the law was imperative, there was not any discretion about it left with the Commissioner, that perhaps a mandamus would lie to compel the registration of a party; but after he has gotten on the roll and his name is on the register, it can be stricken off by the commissioner for the reasons set out here. The bill reads:

In case any corporation or association so registered shall refuse or shall fail at any time to file the statements or to give the information required under this act, or to comply with the requirements of this act, or in case information furnished by it shall be false in any material particular, the Commissioner of Corporations shall have power to cancel the registration of such corporation or association after thirty days' notice in writing to such corporation or association.

If any of those conditions exist, he has the power to strike the name of the party from the register. Then it provides:

Any corporation or association aggrieved by such action of the Commissioner of Corporations may apply to the supreme court of the District of Columbia, in a suit or proceeding in equity, for such relief in the premises as may be proper, and said court shall have jurisdiction to hear and determine such application, subject to appeal as in other causes in equity.

I say that there is not the first element of a judicial act in the action of the Commissioner. It is an administrative act. It is an executive act. He determines for himself whether or not that name shall remain on that book. He is to determine whether in his opinion the information is false or true, whether it was full enough or not sufficiently full to disclose the thing fairly to him. A thousand conditions may exist which under this bill may justify him in striking the name from the roll, and from that act it is proposed to permit an appeal or resort to a court for review.

Mr. LITTLEFIELD. Does that provision in relation to the court amount to anything much more than a suggestion for a mandamus proceeding? It does not appear to be an appeal in terms. It is a curious kind of a provision.

Mr. DAVENPORT. Of course it is curious. It is all curious.

Mr. LITTLEFIELD. It does not appear just exactly who are going to be the parties to it. It is not an appeal in terms. It is authorizing somebody for the party to appeal to the court for such relief as the court may give. That is about what it comes to.

Mr. DAVENPORT. I think what Mr. Justice Field says here will be sufficient to satisfy the committee. Back of that is a further question. If this is an executive act performed by the Commissioner of Corporations I do not believe it is within the power of any tribunal to review the exercise of the discretion of an executive officer. I suppose that is absolutely conclusive, and the only ground they would have for a review would be if the Commissioner of Corporations had misconstrued and misapplied the law, or perhaps as where they have held in some of the cases involving the exercise of discretion on the part of the Post-Office Department that where the exercise of that discretion was clearly wrong the court might interfere to correct it.

Mr. MARBURG. Could not Congress confer that power?

Mr. DAVENPORT. That is precisely the thing we are going to talk about.

Mr. LITTLEFIELD. That is the question, whether the Congress, under a form of government where the three departments, the executive,

legislative, and judicial, are distinct and independent, can confer that power.

Mr. MARBURG. Have they not power in the matter of patents?

Mr. DAVENPORT. There is another pseudo analogy.

Mr. LITTLEFIELD. Of course as a general question the courts can not review the exercise of the executive discretion, and that is the proposition right now.

Mr. MARBURG. May I make it clear? Admitting the rule that without special provision of law there shall be an appeal from the executive officer—there is no such appeal—the question is whether Congress can specifically confer that right of appeal.

Mr. DAVENPORT. That is precisely the point we are going to talk about.

Mr. LITTLEFIELD. It comes down to the point whether the legislative can control the executive discretion.

Mr. DAVENPORT. The theory of the proponents of this bill, so far as we can discern that theory from its provisions, is that the business of this country is not to be under the absolute control of a czar who is to say, "You shall have this favor" and "You shall not have it," but that the party has got a right to get his name on this register, and that he has got a right to have it stay there, and if the incoming or the outgoing official sees fit to strike his name off the register, with all the terrible consequences that follow, he is to have a place of refuge to which he can resort, and that is to be the supreme court of the District of Columbia, which will protect him in it. The determination of that question rests to a certain extent, I believe, upon the question whether or not the power that is sought to be conferred upon this officer is a judicial or an executive power. If it is the judicial power, it is one thing; if it is executive power, it is another. If it is an executive power, can any judicial power be extracted from it, or can the court be clothed with the power to review that action? I submit that the authorities are clear that no such power under our Constitution can be vested in the court.

Mr. LITTLEFIELD. That is, your proposition is that the Executive in the exercise of his discretion, within his constitutional limits, is supreme.

Mr. DAVENPORT. Yes, and that if you undertake to confer that executive power upon a court, it is a nullity. A few quotations from this case, commencing on page 254 of Thirty-second Federal Reporter:

The Government established by that instrument is one of delegated powers, supreme in its prescribed sphere, but without authority beyond it. No department of it can exercise any powers not specifically enumerated or necessarily implied in those enumerated. Such is the teaching of all of our great jurists.

\* \* \* \* \*

The first section of the third article of the Constitution declares that "the judicial power of the United States shall be vested in one supreme court, and such inferior courts as Congress may, from time to time, ordain and establish." The second section of the same article declares that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made."

Then it proceeds to cite the various cases, and then it continues:

This section was modified by the eleventh amendment, declaring that "the judicial power shall not be construed to extend to any suit, in law or equity,



commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

\* \* \* \* \*

The judicial power of the United States is therefore vested in the courts, and can only be exercised by them in the cases and controversies enumerated, and in petitions for writs of habeas corpus. In no other proceedings can that power be invoked, and it is not competent for Congress to require its exercise in any other way. Any act providing for such exercise would be a direct invasion of the rights reserved to the States or to the people; and it would be the duty of the court to declare it null and void. Story says, in his Commentaries on the Constitution, that "the functions of the judges of the courts of the United States are strictly and exclusively judicial. They can not, therefore, be called upon to advise the President in any executive measures, or to give extra judicial interpretations of law, or to act as commissioners in cases of pensions or other like proceedings." (Section 1777.)

The judicial article of the Constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. (*Chisholm v. Georgia*, 2 Dall., 431, 432; 1 Tuck. Bl. Comm. App., 420, 421.)

You have got to have a case, in other words, to bring the judicial power of the United States into operation. Then Justice Field proceeds to quote from the case of *Osborn v. U. S.*, where Chief Justice Marshall dilates upon the fact that there have got to be parties to a proceeding in order to call into operation the judicial powers. Having defined what the judicial power is, and how it can be exercised only by the courts, and that they can exercise only such powers as are of a judicial nature, he proceeds to take up the subject as to whether you can clothe the courts of the United States with any further power than of a strictly judicial nature, and he holds that it is impossible. But inasmuch as those matters are covered by the Supreme Court itself in the case of the Interstate Commerce Commission *v. Brimson* (154 U. S.), I will quote from that. This case is to be found beginning on page 447. There was a divided court here, and Mr. Justice Brewer and Mr. Justice Fuller and Mr. Justice Jackson dissented, and their dissenting opinion is to be found in 155 U. S., at the first page. The act under consideration was the interstate-commerce act, and under it the Commissioners, when they were investigating these matters committed to it, were authorized to summon witnesses, and upon the refusal of the witnesses to testify or to produce books, and so forth, the Commission was entitled to go into court and present a case against the party, and obtain from the court an order for their production. The court sustained the validity of that provision.

Mr. LITTLEFIELD. That is the same provision they operated under in the recent Harriman case?

Mr. DAVENPORT. It was the one they operated under in the Hearst case.

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well to all controversies to which the United States shall be a party (art. 3, sec. 2) and as the circuit courts of the United States are capable, under the statutes defining and regulating their jurisdiction, or exerting such power in cases or controversies of that character, within the limits prescribed by Congress (25 Stat., 434, c. 866), the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy" within the meaning of the Constitution. The circuit court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an

application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

Then they quote from what the court below said, and continue:

In other words, if the Interstate Commerce Act made the refusal of a witness duly summoned to appear and testify before the Commission in respect to a matter rightfully committed by Congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of Congress, in the name of the Commission, and under the direction of the Attorney-General of the United States, against the witness so refusing to testify, to compel him to give evidence before the Commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

Then they go on and speak about the powers of Congress to regulate commerce between the States, and the choice of Congress as to the means to be resorted to so long as they keep within certain limits, and they then proceed:

It was not disputed at the bar, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations, or preferences, by carriers engaged in interstate commerce, in respect to property or persons transported from one State to another, is a proper regulation of interstate commerce, or that the object that Congress has in view by the act in question may be legitimately accomplished by it under the power to regulate commerce among the several States. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object to be accomplished.

They hold that as between the commissioner and the witness a case or controversy was presented which could be adjudicated by the court. They say:

In the course of the argument at the bar our attention was called to Hayburn's case (2 Dall., 409) and *United States v. Ferreira* (13 How., 40, 46), as announcing principles not in harmony with the views we have expressed in this opinion.

Hayburn's case was an application for a mandamus to be directed to the circuit court of the United States for the district of Pennsylvania, commanding that court to proceed in a petition by Hayburn to be put on the pension list of the United States in conformity with an act of Congress approved March 23, 1792 (c. 11, 1 Stat., 243), which provided for the settlement of the claims of widows and orphans barred by limitations previously established, and to regulate claims in invalid pensions. This court took the case under advisement, but as Congress provided in another way for the relief of invalid pensioners, no decision was made. Nevertheless, by a note to Hayburn's case we are informed of the views expressed at the circuit by different members of this court in relation to the act of 1792. They concurred in holding that it was not in the power of Congress to assign to the courts of the United States any duties except such as were properly judicial and to be performed in a judicial manner, and that the duties assigned to the circuit courts were not of that description and were not contemplated by the act of Congress as of that character, and, consequently, that the act could be considered as only appointing commissioners for the purposes mentioned in it by official instead of personal descriptions, which positions the judges of the court were at liberty to accept or decline.

In a note prepared by Chief Justice Taney, under the direction of this court, and found in 13 How., 51, 52, an account is given of Todd's case, which also involved the validity of the act of 1792, so far as it imposed upon the circuit courts duties relating to pensions. And it is there stated that Chief Justice Jay and Justice Cushing, upon further reflection, became satisfied that the

power conferred by the act of 1792 on the circuit court as a court could not be construed as giving such power to the judges of the court as commissioners.

In other words, they rejected the idea that it was a designation of them by their official title. They continued:

The same general principles were announced in Ferreira's case, which arose under the treaty of 1819 between Spain and the United States, and under certain acts of Congress passed to carry a particular article of that treaty into execution. The case came before this court upon appeal from a decision or award made by the district judge, acting upon a special statute authorizing him to receive and adjudicate certain claims. A motion to dismiss the appeal for want of jurisdiction in this court raised the question whether the district judge exercised judicial power, strictly speaking, under the Constitution. The motion to dismiss was sustained. Chief Justice Taney, referring to the statutes under which the district judge proceeded, said: "It is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term are to be made; no process to issue; and no one is authorized to appear in behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*, and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge. It is too evident for argument on the subject that such a tribunal is not a judicial one, and that the act of Congress did no intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges and their respective jurisdictions are referred to in the law merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commission." (13 How., 40, 46, 47.)

Then here we come to Gordon's case (117 U. S.), and the case of *In re Sanborn* (148 U. S.). They say:

In Gordon's case the question was whether this court had jurisdiction to review the action of the court of claims in respect to a claim examined and allowed in the latter court under an act of Congress (12 Stat., 765, ch. 92, secs. 5, 7, 14) which, among other things, provided that no money should be paid out of the Treasury for any claim passed upon by the Court of Claims until after an appropriation therefor should be estimated by the Secretary of the Treasury, and an appropriation to pay it to be made by Congress. Under that act neither the Court of Claims nor this court could do anything more than certify their opinion to the Secretary of the Treasury, and it depended upon that officer, in the first place, to decide whether he would include it in his estimates of private claims, and if he decided in favor of the claimant it rested with Congress to determine whether it would or would not make an appropriation for its payment. Neither the Court of Claims nor this court could, by any process, enforce its judgment: and whether the claim was paid or not did not depend on the decision of either court, but upon the future action of the Secretary of the Treasury and of Congress.

That appeal was dismissed, and then follows Sanborn's case, and a long examination of all the cases, with this result, that where you seek to impose upon a court the power to review an act which rests in the discretion of a commissioner—

Mr. LITTLEFIELD. That is, executive discretion?

Mr. DAVENPORT. The executive discretion of the Commissioner, that Congress can not confer power of review upon a court. In other words, you come back to the proposition that whatsoever this commissioner sees fit to do in excluding a party from the roll is final.

The court has no power, no authority—can not have any—to review that action. I have said enough on this whole subject to satisfy my loquacity, I think, and I am ready to stop.

Mr. LITTLEFIELD. Do I understand that your fund is exhausted?

Mr. DAVENPORT. Not exhausted, by any means, but I recognize that there is a limit. By and by, when this matter assumes a concrete shape and we see just what it is that these gentlemen really ask this committee to do, I would like to analyze the provisions as they then appear in the light of what I have said hitherto.

Mr. LITTLEFIELD. That is, when the pool settles down and there is no further disturbance you would like to have an opportunity?

Mr. DAVENPORT. Yes.

Mr. MARBURG. I thought it was understood that my colleagues were to have the closing.

Mr. LITTLEFIELD. You may close; but if you submit by your amendments any new propositions, it is perfectly proper for these people to be heard in criticism of them, and then you may close the whole thing.

Mr. EMERY. Do I understand it is proposed now to vest the powers which they were first going to give to the Commissioner of Corporations, and which it was then suggested to give to the Interstate Commerce Commission, in the Commissioner of Corporations? That is, do I understand that those powers are to be taken back again and vested in the Commissioner of Corporations?

Mr. LITTLEFIELD. I understand the last proposition is that the Commissioner of Corporations in the first instance shall exercise jurisdiction, and then the matter may be further determined by the Interstate Commerce Commission, and later on by the Supreme Court. That is, in a general way, my understanding.

Mr. DAVENPORT. Perhaps I ought to call the attention of the committee, very briefly, to what this bill would legalize. It would legalize such boycotts as are described and set forth in the complaint in the Loewe Case and in the Buck's Stove and Range Case. It would legalize all such boycotts as were attempted in the Debs Case and in the Ann Arbor Case, cases which came before Judge Taft, where the employees of a railroad attempted to enter into an arrangement with their employers by which the employers were not to haul the goods or the cars of another railroad. It would legalize that, of course, under the terms of this proposed bill. It would also legalize all those things that might generically be described as Sam Parksism, as applied to interstate commerce. It would also legalize all agreements to strike for the purpose of establishing the closed shop. It would legalize all arrangements like that which the Pennsylvania Company threatened to carry out in its dealings with the Toledo and Ann Arbor Company when, at the demand of the engineers on the Pennsylvania Railroad, they were going to refuse to haul the cars of the Toledo and Ann Arbor Railroad Company, and they went into court and enjoined them. If this proposed bill in its present provisions were enacted, all those things would be legitimatized. Anything that the employees among themselves may agree to do, that they may agree to do with their employers, or their employers may agree to do among themselves or with their employees, is made legitimate by these provisions; and this must have been done designedly.

Mr. LITTLEFIELD. In short, it authorizes, if it authorizes at all, any combination or conspiracy that does not contemplate physical violence?

Mr. DAVENPORT. Yes. It has been suggested, and I believe it is incorporated in the bill as introduced in the Senate, that it might be remedied by inserting the words "to strike for any purpose not unlawful at common law." I am quite sure that our friends, loving their allies of the labor world as they do, would never seriously ask to have such a provision as that inserted in the law that would prohibit men from striking absolutely, because we all know that at common law, as Mr. Gompers has said, the combination to strike to raise wages was not only unlawful but criminal; and I would suggest to the gentlemen that in their efforts to improve this matter they resort to some other test than that of those things that were unlawful at common law, because Congress, if it passed such a thing as that, would be immediately and directly accused of trying to take away from the laboring people the right to strike as it is secured under the present Sherman Antitrust Act.

Mr. LITTLEFIELD. Inasmuch as Mr. Gompers personally stated in these hearings that nothing would be satisfactory to him unless he is exempted absolutely from the operation of the Sherman antitrust act, perhaps our friends may not feel it necessary to exercise their ingenuity in finding provisions that will take care of the organizations.

Mr. MARBURG. With little knowledge of the subject, I might say that as Mr. Low has already stated our sole purpose is to relieve labor of the anxiety and the fear that the Sherman antitrust act will be interpreted to prohibit the strike. Mr. Gompers wants to go further, and he wants to legalize boycotts. Mr. Low and some of us are opposed to such an extension of that power.

Mr. LITTLEFIELD. I understand.

Mr. MARBURG. Mr. Gompers's position is this: That he will go with us as far as we are willing to go. If we will not do more than to legalize strikes, he will go with us that far, hoping for further remedies.

Mr. LITTLEFIELD. Then he has communicated to you views that he did not succeed in communicating to the committee.

Mr. MARBURG. I asked him specifically if he indorsed the bill, and he said yes. The hearings will show that.

Mr. DAVENPORT. Are you supporting the proposition to legalize strikes for all purposes?

Mr. LITTLEFIELD. Yes; they have it in the bill "for any cause."

Mr. DAVENPORT. For a specific case, take the case where the locomotive engineers of the Pennsylvania Railroad were going to strike if the Pennsylvania Railroad hauled cars of the Toledo and Ann Arbor Railroad Company, and thereby force their employers not to haul them.

Mr. MARBURG. I imagine that the court would step in and say that that was an interference with interstate commerce.

Mr. LITTLEFIELD. It does not make any difference what the court would do. What do you want to do? You have a provision here authorizing a strike for any cause. Do you stand by that or are you opposed to that?

Mr. MARBURG. I would be inclined to stand by it, because I think in that case the interstate commerce clause would come in, and in other cases the common law would step in. They do not authorize them, but they simply extend——

Mr. EMERY. The language of the bill expressly authorizes a strike "for any cause."

Mr. DAVENPORT. This is an attempt to rob the people of the country of the benefit of the Sherman antitrust act in such interruptions of commerce, either transportation or trade, which would result from a strike of that character?

Mr. MARBURG. I think that is correctly stating it; but other remedies would step in to prevent it.

Mr. DAVENPORT. But why deprive the people of that protection?

Mr. LITTLEFIELD. The only remedy you have except the common law is the Sherman antitrust act, and you would wipe that out.

Mr. EMERY. Do you mean any criminal remedy?

Mr. LITTLEFIELD. There is no regulation under the interstate commerce act except under the Sherman antitrust act. Of course, if that is the only conception you people have of the legislation you are attempting, that is one thing. The amendment made would wipe out the Sherman antitrust act. You have not any provisions that would prevent these results. Your lawyers must have known better than that. I am assuming now that they have intelligence enough to get outside of their offices. Certainly the one you referred to knew better than that.

Mr. DAVENPORT. Mr. Loewe had a lot of men, both union and non-union men, working for him that had been working for him for years. They were entirely satisfied; his union men were entirely satisfied. For the purpose of hitting at another concern than Mr. Loewe's, as a means to subdue a large manufacturing concern in Yonkers, as a step in that way, they wanted to get control of the business of Mr. Loewe in order that he should use the union label in a certain grade of hats. That was the real purpose lying back of this case. Mr. Loewe was waited upon and told: "You must unionize your shop and acquire the right to use the union label. In order to do that you must discharge your nonunion men." He said: "Why, I can not do that; I can not turn these men out on the street." "Well, if you do not, this is what we shall do to you. We will call out every union man in your factory. We will drive out or force out the nonunion men, so that you can not manufacture. At the same time, for the purpose of carrying out our purpose, we will send men out on the road to go to your customers and tell them that if they buy any hats from you we will boycott their business, and if they continue to buy of you we will send men to their customers and tell them that if they buy of them, because they buy of you, we will boycott their business, and so we will do through the United States." Upon the refusal of Mr. Loewe to do as they demanded they proceeded to do that very thing. Right in the midst of the busy season, when he was filling orders which he had obtained from people in other States, they ordered out his union men, and then they threatened the nonunion men that if they continued to work for him they would not have an opportunity to work in any shop in the United States. That drove them out. That left the business at that end as completely paralyzed as if there had been a fire. Simultaneously they sent out 8 or 10 men all over the country

to his customers and carried out their threats. There was an illegal combination to restrain trade between the States, to cut off the possibility of filling orders by a strike, and at the same time to prevent men from buying. I want to know whether it is your purpose to amend the Sherman antitrust act so as to deprive the people of this country of the protection that is afforded against a strike of that character.

Mr. MARBURG. I should call that a boycott, and I should call it a vicious boycott. As I say, I am not legal counsel to set forth whether this provision does that or not; but our purpose is not to legalize any such proceeding as that.

Mr. DAVENPORT. That is not the point. Are you anxious to deprive the people of this country of that protection?

Mr. MARBURG. No; I should want the Sherman law to still protect the people against a boycott.

Mr. LITTLEFIELD. The bill as you have it drawn, on its face, authorizes that very thing.

Mr. MARBURG. That is a question for the lawyers.

Mr. LITTLEFIELD. The lawyers who drew it must have known it. If you people who had it drawn did not know it, the lawyers did not give you a straight deal on the language. There can not be any doubt about the fact. The bill authorizes a strike for any cause. Of course a boycott is a cause.

At 1.15 o'clock p. m. the subcommittee took a recess until 2 o'clock p. m.

#### AFTER RECESS.

The subcommittee met at 2.15 o'clock p. m., Hon. Charles E. Littlefield (chairman) in the chair.

#### ARGUMENT OF MR. HENRY B. MARTIN, 27 THAMES STREET, NEW YORK, REPRESENTING THE AMERICAN ANTITRUST LEAGUE.

Mr. MARTIN. Mr. Chairman and gentlemen of the committee, I represent the American Antitrust League, of which I am national secretary, and I appear at this time in opposition to the proposed amendment to the Sherman antitrust act of 1890, or rather I should leave out the word "Sherman."

Mr. LITTLEFIELD. We know what you mean when you say it, and that covers the whole ground.

Mr. MARTIN. In saying I appear in behalf of our organization in opposition to the proposed amendment known as the Hepburn bill, I wish to be understood as opposing that part of the amendment which proposes to give greater license and leeway to the so-called business combinations, combinations of corporations and individuals and organizations for the purpose of profit by means of monopolies. I am inclined, and many of the members of our organization are inclined, to favor some amendment to the antitrust act, which would exempt labor organizations and farmers' organizations from the operations of that law. We have always understood, most of us, and it was my understanding at the time the law was passed in 1890, that it was not intended to apply, and would not apply, to

labor organizations or farmers' organizations. In fact, at one time the bill received, I believe, a majority vote in the Senate, a very large majority vote of the Senate, containing a provision specifically exempting them.

Mr. EMERY. May I ask on what authority you make that statement that an amendment exempting labor and agricultural organizations received a large majority vote in the Senate?

Mr. MARTIN. I said it was my understanding, but I will be very glad to look up the official record and correct it if I am wrong.

Mr. LITTLEFIELD. Right there, let me interrupt you. Of course, this Sherman antitrust law makes all contracts and agreements in restraint of trade void, and all persons who are parties thereto criminally liable. Do you wish to be understood as saying that labor organizations ought to be allowed to make contracts of that sort that other people are prohibited from making?

Mr. MARTIN. No. The reason we favor the excepting of labor organizations from the provisions of the act, criminal and otherwise, is because labor organizations are not the same kind of combinations that capitalists make. The form of organization and the purpose of the organization formed by the capitalists is a combination for the creation of a monopoly, which is a public enemy. It is intended to extort undue profit from the public. The combination made by the labor organizations is a combination to raise the general level of the comfort and welfare of the people and the increase in the share of the necessities of life received by the great mass of the wealth producers, which purpose and work the laws of all civilized nations recognize as commendable and beneficial to civilization. The other—the combination of wealthy men to establish monopoly—is hostile to good government and liberty, but the labor organization, as a general rule, is recognized by all enlightened countries as beneficial to civilization.

Mr. LITTLEFIELD. In order to accomplish both of these results, one of which is hostile and the other advantageous, both the parties may enter into agreements that restrain interstate trade and commerce. The only power Congress has to reach either condition is through the commerce clause. Do you take the ground that labor organizations ought to be authorized to make contracts that would restrain interstate trade and commerce for their purposes, while the other people should not be authorized to make the contracts for the purposes that they have in mind?

Mr. MARTIN. I am in favor of a law prohibiting combinations among capitalists for the purpose of establishing monopolies, and that is what the law prohibits and condemns to-day. I am in favor of the law exempting organizations of laborers, who are struggling merely to secure a larger share of the just fruits of their labor, from the operations of the law, because their effort is distinctly beneficial, not only to themselves and to the entire community, but to civilization.

Mr. LITTLEFIELD. In order to accomplish that purpose, you want them to be authorized to do what other people are punished criminally for doing?

Mr. MARTIN. No, sir; the other people are not trying to do what they are trying to do.

Mr. LITTLEFIELD. Yes, but if you are exempted from the operations of the Sherman antitrust law, you are authorized to do what other people are prohibited from doing.



Mr. MARTIN. No, sir.

Mr. LITTLEFIELD. Then you do not understand the force of language.

Mr. MARTIN. The labor organizations are not trying to do what the other people are doing.

Mr. LITTLEFIELD. You depart from the assumption. Let me give you this illustration. You take the parties who are interested in any product that they may undertake to monopolize, and if they get a complete monopoly, that, in a very indirect degree, interferes with interstate trade and commerce. Take the Addystone pipe case. Suppose the monopoly had been sustained, the pipe would have been still transported in commerce, but so far as the public is concerned the results would have been almost inappreciable. On the other hand, if the men engaged as employees and operatives of the railroads were authorized to enter into a combination, that combination, if carried out, might absolutely stop interstate trade and commerce. The one might not have any appreciable effect on interstate commerce; the other might have absolutely paralyzed it, and has done so in a number of instances. Do you want them authorized to do that?

Mr. MARTIN. I did not grasp that statement.

Mr. LITTLEFIELD. They did it in the Debs case.

Mr. MARTIN. You ask me to find a certain person guilty or innocent, or two certain parties, of a certain offense, but you do not furnish me with the full evidence as to the case.

Mr. LITTLEFIELD. The Debs case was exactly that kind of a combination between the employees of railroads. It was denounced by the Sherman antitrust law, and if you exempt them from the operation of the Sherman antitrust law, so far as that is concerned, they would be authorized to carry out just exactly the kind of a combination they did in the Debs case, which absolutely paralyzed interstate trade and commerce.

Mr. MARTIN. As to the Debs case, I have some knowledge of that case from personal contact. I was in Chicago at the time and knew what took place, although I may not be very familiar with the legal decision.

Mr. LITTLEFIELD. When you come to discuss the legal questions, you would probably be more intelligent if you had read the opinions of the court.

Mr. MARTIN. I have read the opinion of the court, too, in that case. I might make a mistake in giving an opinion on a hypothetical case, such as you gave, with only a partial knowledge of the facts, but with a full knowledge of the facts I might find my error. In that case the Department of Justice made an error, because the prosecuting attorney in that case was the attorney of the General Managers' Association of Chicago, which body was operating flagrantly in violation of the antitrust act, against the whole people of the country, far worse than the organization of labor was in that case. The Attorney-General was in consultation with him, he took this lawbreaker's advice, who also helped to prepare the case against labor.

Mr. LITTLEFIELD. How did that change the legal status of it?

Mr. MARTIN. It showed that there was a combination of monopolists with the Attorney-General formed and operated so as to permit a certain body of capitalists, known as the General Managers' Association, to escape the operations of the law, and to make use of the

law, which was made to punish their acts—against a body of men whom the law never was intended to be enforced against.

Mr. LITTLEFIELD. You are quite familiar with the Debs case. Do you want to go on record as stating that labor organizations ought to be authorized to do what they tried to do in the Debs case?

Mr. MARTIN. I am not quite clear as to what you think they were trying to do in the Debs case.

Mr. LITTLEFIELD. You know what the facts were.

Mr. MARTIN. I know what some of the facts were.

Mr. LITTLEFIELD. You know what the court passed on, do you not, or do you?

Mr. MARTIN. The court had two propositions, as I understand, as to whether they were guilty of violation of the antitrust act or violation of certain other acts, and in the final determination of the case, my recollection is that the court found them guilty of violating the law which prohibited the tying up of mail routes and not for violating the antitrust act.

Mr. LITTLEFIELD. The opinion went on both grounds. I will read you what the court said in the very last case on that.

Mr. EMERY. I would like to ask Mr. Martin a question right there. It is true this question does not relate directly to the matter at issue, but inasmuch as Mr. Martin has stated that the law was unequally applied to combinations I should like to ask Mr. Martin, as a matter of fact, if he does not remember, or does not know, that Judge Grosscup called the attention of the Federal grand jury of Chicago to the very condition which he stated?

Mr. MARTIN. I am not thoroughly familiar with that fact, but I have heard that that was the case.

Mr. EMERY. Do you not know, as a matter of fact, that the same suggestion you now throw out was thrown out then, and Judge Grosscup, presiding judge, called the attention of the grand jury to the facts, and they made an investigation and it disclosed no such condition?

Mr. MARTIN. I am not sure of that. I am sure, if they went to the bottom of the facts, they would have found just such a condition, though with a far greater amplitude of detail than I have given.

Mr. LITTLEFIELD. Here is exactly what the court said in the last case in which they discussed that, the Loewe case:

We enter into no examination of the act of July 2, 1890 (ch., 647, 26 Stat., 209), upon which the circuit court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed.

Mr. MARTIN. I think that confirms my statement and shows that I was familiar with the main point involved.

Mr. LITTLEFIELD. Oh, yes; the main point involved in the Supreme Court of the United States. I say the Supreme Court of the United States put it upon the broader ground. But here is what Judge Taft said about the combination in the Debs case:

But the illegal character of this combination, with Debs at its head and I helan as an associate, does not depend upon the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary a living and part of the people of this country as are the arteries of the human body, and yet Debs and Phelan and their associates proposed, by inciting the employees of all the railroads of the country to suddenly quit their service,

without any dissatisfaction with the terms of their employment, to paralyze utterly all traffic by which people live, and in this way compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible, and over whose acts they can properly exercise no control, to pay more wages to his employees.

Do you think that ought to be authorized?

Mr. MARTIN. Mr. Chairman, the judge is mistaken as to one point of fact when he says that the American Railway Union organizations attempted to make that strike for the purpose of coercing Pullman. That organization, only two or three days before the trouble began, voted, by an overwhelming majority, not to strike to force the settlement with Pullman. Then the companies discharged the crews without notice, simply for the purpose of forcing them to strike anyway.

Mr. LITTLEFIELD. I understand you to say that Judge Taft does not state the facts correctly.

Mr. MARTIN. Not that one fact.

Mr. LITTLEFIELD. Assuming that he does state them correctly, assuming that Judge Taft, in his capacity as judge, on the evidence presented to him correctly found the facts as I have stated them here, are you in favor of authorizing that sort of a condition? That is, do you believe that the law ought to permit that condition to be carried out?

Mr. MARTIN. Put in your own words, please, what you mean by "that condition." Then I will answer the question.

Mr. LITTLEFIELD. I mean the condition described by Judge Taft in the language I have just read to you. Do you think the law ought to be such as to authorize a combination of that character and place it beyond the reach of the courts?

Mr. MARTIN. In order that I may give an intelligent answer to that question, which is a big question, as the judge's language indicates, a question as to what ought to be done by the labor men who had the power to operate the railroads, whether they should exercise their power to stop operating the railroad for a cause that looked good to them, is a big question. It is also a big question to-day, in that same connection, whether a half a dozen men sitting in an office in New York shall have the power, more absolute than the labor men's power, over the railroads of the United States, and use it for monopoly profit. These men who organized at that time organized for the purpose of improving their wages, which, in the case of hundreds of thousands of men in the railroad service at that time, were less than \$1 a day. If you have ever done railroad work at less than \$1 a day you will realize that they had some cause to organize so as to better their condition.

Mr. LITTLEFIELD. Do you think that the statute, as it stands now, would prohibit precisely the same condition as I read to you from the opinion of Judge Taft?

Mr. MARTIN. I do not.

Mr. LITTLEFIELD. Do you think that the law ought to be amended or repealed so as to exempt the men engaged in that kind of a combination from the operation of the law? That is a simple question.

Mr. MARTIN. Not so simple. I think it is hardly fair to the whole truth on the subject for a question as long as that to be presented to me for a categorical answer, yes or no, but I will be very glad to accept from the chairman this document and to read these decisions and I will be glad to prepare as elaborate an answer, with as much deliberation.

as was used in the preparation of the question. I want to say to you that this is a very great question, and it is not to be decided by me answering "yes" or "no," a categorical answer to a long question framed up as that is. I do not think that tends to elucidate the merits of the questions. I am trying to suggest to the committee something I think will throw a little light on this subject.

Mr. LITTLEFIELD. You are trying to suggest that labor organizations be exempted.

Mr. MARTIN. Yes, sir.

Mr. LITTLEFIELD. And when I put to you a case showing what they have done contrary to the provisions of the law, you decline to answer a question based on those facts.

Mr. MARTIN. No, sir; I promise to answer it.

Mr. LITTLEFIELD. You do not answer it now.

Mr. MARTIN. I will give you a partial answer to it now. I am in favor of exempting the labor organizations from the operation of the Sherman antitrust law, because I believe that the labor organizations are organized for a beneficent purpose.

Mr. LITTLEFIELD. You are in favor of making it possible to accomplish the results described in that opinion? That is a simple question.

Mr. MARTIN. I do not think that the result described in that opinion was an accurate description of the facts that resulted from labor organizations.

Mr. LITTLEFIELD. Are you in favor of an interstate boycott? That is a concrete question, and I suppose you understand it; being familiar with labor organizations you know what a boycott is.

Mr. MARTIN. Yes, but it is a very difficult thing to define.

Mr. LITTLEFIELD. Have you read the Loewe case?

Mr. MARTIN. Yes, sir.

Mr. LITTLEFIELD. Do you know what it was?

Mr. MARTIN. I have heard it stated here by Judge Davenport.

Mr. LITTLEFIELD. It was an opinion prohibiting interstate boycott.

Mr. MARTIN. Yes, substantially.

Mr. LITTLEFIELD. Do you think it ought to be authorized or prohibited? There, in the Loewe case, the court held that those organizations were engaged in interstate boycott, and held that they were in the provisions of the law.

Mr. MARTIN. Without accepting anyone's definition of a boycott (as there is no official definition of it, I believe), but accepting my own definition of it, I am in favor of it, and if the chairman will permit me, I should like to answer fully on that. I am in favor of a boycott, because a boycott, in the first place, is a thing that is intended to redress wrong, and in the second place, it is a thing you can not stop by law if you try it. It is as old as civilization. It is the ostracism of the old-time Greeks against people they did not like. If the people of the United States do not like any particular thing, they can ostracize that thing—can refrain from using it. We hear a good deal about the Sherman law affecting labor organizations as regards boycott. I think they have the privilege of doing all the boycotting needed in their business, even under the Sherman antitrust act as it now stands. They do not have to declare a boycott in terms in order to make one effective.

Mr. LITTLEFIELD. I assume that if you came in to tell the committee what the law ought to be, you know what the law is. The Loewe case

is the last definition of the law. Do you think a boycott, such as is described in the Loewe case and such as the court held was within the operation of the Sherman antitrust law, ought to be authorized? That is a simple question.

Mr. MARTIN. Well, Mr. Chairman, before I would answer that question directly "Yes" or "No," I would want to make an examination of all the facts in the case.

Mr. LITTLEFIELD. Have you ever heard of the Buck's Stove and Range Company case?

Mr. MARTIN. Yes, sir; I have.

Mr. LITTLEFIELD. Do you know anything about that?

Mr. MARTIN. Only in a general way; I have not examined it in detail.

Mr. LITTLEFIELD. Did you ever read Judge Gould's opinion on that, ordering the temporary injunction?

Mr. MARTIN. Except a short newspaper report on it, no. Mr. Chairman, I think it is hardly conducive to thorough elucidation of the case or throwing any particular light on it to ask me to pass judgment on a particular case without furnishing me all the facts.

Mr. LITTLEFIELD. I know; but you ask us to recommend some legislation here exempting labor organizations from the operation of the Sherman antitrust law. Here are some circumstances under which that law has been held to apply, and we have to take all those things into account when we make up our judgment as to what to do. We want to know what the effect of the legislation is going to be. If the effect of the legislation would be to authorize an interstate boycott, that is the thing we ought to consider, ought we not?

Mr. MARTIN. Certainly.

Mr. LITTLEFIELD. As to whether we think it is wise to recommend it. It is upon that precise point I wanted to get your opinion, as to whether you thought an interstate boycott ought to be authorized.

Mr. MARTIN. Upon that point I say, I do not think it matters so very materially whether the Sherman antitrust act, or an amendment to it, is passed, or the act, as it now stands, exempts labor organizations from the force of that act as applied to boycotts, because I am quite settled in my opinion that the labor organizations of the country can do about all the boycotting they want to if the Sherman antitrust act remains as it is.

Mr. LITTLEFIELD. What is it they can not do, if it remains as it is, then, if they can keep right on boycotting?

Mr. MARTIN. It has been held by some that the effect of the decision in the Loewe case was to prohibit them from striking. That is an easier act to get at than the fact of a boycott.

Mr. LITTLEFIELD. Who holds that the decision in the Loewe case prohibits them from striking?

Mr. MARTIN. That has been believed by some of the people themselves.

Mr. LITTLEFIELD. Have you read the opinion?

Mr. MARTIN. The Loewe opinion?

Mr. LITTLEFIELD. Yes; you do not find anything of that kind in it, do you?

Mr. MARTIN. It is a question whether it could be construed that way or not, a question in my mind. Are you satisfied that it would not apply to strikes?

Mr. LITTLEFIELD. It would not apply to strikes unless a strike is the instrument being used to carry out a boycott. Of course, if you once get a boycott—a criminal conspiracy to injure a person—any act to carry that out would be clearly subject to the same inhibition that the original act was subject to. A strike independent of it is not at all prohibited.

Mr. MARTIN. Mr. Chairman, is it not a fact that every strike is practically a boycott?

Mr. LITTLEFIELD. You know more about that than I do.

Mr. MARTIN. Let me elucidate. For instance, there are substantially two kinds of boycotts. A consumer boycotts the manufacturer when he refuses to buy his product; a worker boycotts a manufacturer when he refuses to work for him. It is a refusal to purchase or a refusal to sell. In Ireland, when they boycott a landlord, they not only refuse to buy from him, but they refuse to sell to him, that is where the word "boycott" came from, and it applies both ways. That is why I said to you that I did not understand that the word "boycott" had received a full definition in law yet. I do not know that there are any two men who would agree on what it means, but in its two main propositions those things are included.

Now, Mr. Chairman, the main purpose I am appearing here in opposition to this legislation, as I stated in the first place, was because we believe the proposed Hepburn amendment will have the effect of permitting criminal conspiracies of great capitalists for the purpose of establishing monopolies to escape from many of the penalties of the law that now hang over them and which they are now liable to.

Mr. LITTLEFIELD. You do not object to it so much on account of its operation so far as the labor organizations are concerned as you do on account of the great combinations of capital?

Mr. MARTIN. As I said, in my opinion the main opposition is the one that I am speaking of now. Incidentally, also, we would desire, if the law might be made clear, that so beneficent an organization as a labor organization should not be subjected to the pains and penalties when it is going about its work in a peaceable and orderly manner. Section 9 of the Hepburn amendment, for instance, says:

That the President shall have power to make, alter, and revoke, and from time to time, in his discretion, he shall make, alter, and revoke, regulations prescribing what facts shall be set forth in the statements to be filed with the Commissioner of Corporations by corporations and associations for profit and having capital stock applying for registration under this act.

That is an indication of a substitution of Executive discretion for the plain prescription of the law, and we believe that the antitrust law was framed by very able, wise lawyers, Senators, and Members of Congress, and that it has stood the test of time very well—that it has operated in the main beneficially to the people—and we believe that the main difficulty to-day is no inherent defect in its provisions or evil results that flow from the enforcement of those provisions, but rather from the lack of the enforcement of the law.

Mr. LITTLEFIELD. There does seem to have been some of that.

Mr. MARTIN. The greatest complaint that the people of the United States have to-day against the antitrust act is not against the provisions of the act, but against the lack of enforcement. We believe that if the act was properly enforced it would destroy practically every monopoly in the United States. The effect of that would be

so beneficial to the people at large, including the wageworkers, that they would have far less occasion to engage in strikes and boycotts than they do at the present time, under the lax enforcement of that law. The main result would be that they would be far less liable to come under the condemnation of the act.

One of the great evils that I believe exists with reference to the enforcement of this act and similar ones made against the establishment of monopolies is the fact that the courts, composed almost entirely as they are of members of the legal profession, many of whom have—

Mr. LITTLEFIELD. Do you have in mind a system of courts composed of other than lawyers?

Mr. MARTIN. Not at all. I was describing what particular kinds of lawyers—lawyers many of whom had formerly been in the service of corporations who had been engaged in violating the law. The result is that they look with lenient eye upon the offenses of their former employers and associates, and are disposed, perhaps, to not enforce the law with as great rigidity and sternness as they should.

Mr. LITTLEFIELD. You do not mean enforce the law, you mean construe and apply the law. What particular decision do you have in mind now that is subject to this criticism you are now making? I have heard that criticism made a great many times and have always had a great deal of curiosity to know just exactly the case and the conclusions reached by the court in construing a statute to justify that criticism. I do not mean that there may not be one.

Mr. MARTIN. I will give you one case, that is the case of the Joint Traffic Association, which was brought before Judge Lacombe, I think it was, of New York, and the facts developed that not only that judge, but several other judges in that circuit, were stockholders in some of the offending corporations at the time the case was brought.

Mr. LITTLEFIELD. What did the court decide?

Mr. MARTIN. The court decided that the combination was legitimate, was not in violation of the law. It was carried up to the Supreme Court of the United States, and that court held that it was a criminal conspiracy.

Mr. LITTLEFIELD. I understand that your criticism is that Judge Lacombe, who passed on the case in either the district or circuit court, was a stockholder in some of the corporations interested?

Mr. MARTIN. He was when the suit was first brought. I understand that while the case was pending he stated in court afterwards, or some of them did, that they had dis severed their connection, or separated themselves from the ownership of the stock, sold it or something of that kind, in order to comply with the letter of the law.

Mr. LITTLEFIELD. That is, he had technically made himself eligible, but your feeling is that the influences still continued?

Mr. MARTIN. I fear so, on account of the character of the decision that followed.

Mr. STEBBINS. May I make a statement in regard to that?

Mr. LITTLEFIELD. Certainly.

Mr. STEBBINS. A bill in equity was filed and it came on for hearing before Judge Wheeler, of Vermont. He was the only judge qualified to sit in that case. I think there were eight judges within that circuit. One of them was sick, if I remember correctly, and the others were disqualified for one reason or another. The case was

heard by Judge Wheeler, and his decision was that there was no violation of the antitrust act. Then it was taken to the Court of Appeals and heard by Judge Lacombe and Judge Wallace; it was a perfunctory matter, I think. Senator Chandler thought that District Attorney McFarland had not properly or vigorously prosecuted the case, and he was so much disappointed that District Attorney McFarland was summoned before the Senate Committee on Interstate Commerce.

Mr. LITTLEFIELD. Was that Wallace McFarland?

Mr. STEBBINS. Yes, sir; of New York.

Mr. LITTLEFIELD. I know him very well.

Mr. STEBBINS. It now turns out that Judge Wallace, having retired and while drawing a pension from the Government, as I understand, is counsel for the tobacco trust, opposing the United States in its attempt to break up that combination.

Mr. LITTLEFIELD. I do not suppose that is a legitimate subject of criticism against Judge Wallace, if he has gone off the bench. I suppose it is open to any attorney to take a client.

Mr. MARTIN. And draw a pension from the United States?

Mr. LITTLEFIELD. I suppose so; I do not see any objection to an attorney, after he has left the bench, taking any client he pleases.

Mr. MARTIN. Would a retired army officer be justified in taking up arms against the Government of the United States?

Mr. LITTLEFIELD. There is no parallel in the two propositions.

Mr. MARTIN. The trust is a public enemy just as much as a foreign government.

Mr. LITTLEFIELD. There is no parallel between the two propositions. If that is the only legal conception you have of the situation, it is, to the very last degree, inadequate.

Mr. MARTIN. It is amply adequate for me.

Mr. LITTLEFIELD. That is all right.

Mr. MARTIN. And I know of my own personal observation that it is adequate and the fixed opinion of a vast number of the people of the United States, and becoming more so, happily.

Mr. EMERY. Will you pardon me a question? You intimate that a judge who could not see his way clear to decide unfavorably to the combination of which you speak, gave evidence of improper bias which made him open to suspicion of improper motives. Would you make the same insinuation against a justice of the Supreme Court who reached the same opinion that the lower court did?

Mr. MARTIN. If he had formerly been a stockholder in or a high salaried employee, as counsel of, a combination operating in violation of the law, and which he knew as a lawyer, was violating the law.

Mr. EMERY. You are assuming facts not proven.

Mr. MARTIN. I stated to the Committee on the Judiciary of the Senate of the United States, at the time when the American Antitrust League preferred charges against the then Attorney-General of the United States, Mr. Knox, of Pennsylvania, that we held, and we believed, that it was good justice and good counsel and good law, that a lawyer who combined and conspired and aided in the preparation of the papers and trust agreements of a criminal conspiracy in violation of the antitrust law, was himself a criminal, and therefore unfit to be Attorney-General of the United States or to sit upon the bench, and we still hold to that opinion, and we believe that the



enlightened public opinion of the American people is coming rapidly to the point where it will insist upon eliminating from its courts and from its prosecuting attorneys' offices and the Attorney-General's office, at all times, any man who has had to do with the organization or the conduct of these criminal conspiracies against public policy.

Mr. LITTLEFIELD. What particular combination was it that Mr. Knox had been connected with? I have forgotten.

Mr. MARTIN. The United States Steel Trust and the Armor Plate Trust and the Carnegie steel combine.

Mr. EMERY. I called Mr. Martin's attention to that in order to find out if he noticed that three of the most distinguished justices dissented from that opinion—Gray, Shiras, and White.

Mr. LITTLEFIELD. The Joint Traffic Association case?

Mr. EMERY. Yes.

Mr. MARTIN. Mr. Chairman, I am not thoroughly familiar with the antecedents of those three judges, but I believe it is the duty of the United States Senate and the President, before any man is appointed to the United States Supreme Court or any other United States court where the antitrust act is to be construed by that judge, that his antecedents should be very thoroughly and minutely examined to see whether he has any bias upon this question, which is so vital to the interests of the people of the United States. The only thing that really threatens the substantial welfare of the people of this country in the future, in my judgment, is the lawlessness and the enormous power of these combinations, who so far have largely been able to escape even the operations of this good antitrust law, framed in 1890.

Mr. DAVENPORT. Have you lodged any complaints with the Department of Justice under the existing law which they have not paid any attention to?

Mr. MARTIN. Yes, sir.

Mr. LITTLEFIELD. What case?

Mr. MARTIN. Judge Davenport's question was a little broad. He said "which they have not paid any attention to." They have paid some attention to them.

Mr. LITTLEFIELD. But they have not taken them up and prosecuted them?

Mr. MARTIN. Yes, sir.

Mr. LITTLEFIELD. What case?

Mr. MARTIN. One case is the Eastern Railroad Association.

Mr. LITTLEFIELD. What is that?

Mr. MARTIN. It is an association composed of several hundred railroad corporations in the fifteen Atlantic coast States.

Mr. LITTLEFIELD. I never had heard of it before.

Mr. MARTIN. It is probably the oldest illegal trust in the United States, as well as one of the largest and most infamous in its operations.

Mr. DAVENPORT. Is there anything in the character of that combination that is in the nature of a trust, or anything in restraint of trade between the States?

Mr. MARTIN. Yes, distinctly so.

Mr. DAVENPORT. As I recall it, that was organized along in 1865.

Mr. MARTIN. In 1868, I believe.

Mr. DAVENPORT. For the purpose of promoting the general interests of the railways and the protection of the members against unjust claims of patentees.

Mr. MARTIN. That is only partially true.

Mr. DAVENPORT. The whole point is whether, in order to protect themselves from infringements of patents and claims of patents, that they had infringed upon somebody's patent, several of the railroads organized an association to deal with that subject. You would not consider that in any way in restraint of trade between the States, would you?

Mr. MARTIN. I certainly would.

Mr. LITTLEFIELD. In what respect have their operations been enlarged? William D. Bishop, for a long time an active man in that combination, was a former president of the New York, New Haven and Hartford Railroad Company. I have always understood from him that that was their purpose. What other purpose had they than that?

Mr. MARTIN. Their purposes are partly, at least, disclosed in their by-laws, their constitution, and standing resolutions, which I will be very glad to furnish the committee, and the effect of their operations has been distinctly injurious to the interests of inventors of every form of railroad appliance.

Mr. DAVENPORT. Is that in restraint of trade between the States?

Mr. MARTIN. Yes; they practically destroy a man's opportunity to sell his patent or his invention to a railroad company.

Mr. DAVENPORT. That is the precise kind of a combination that the United States Supreme Court says is not within the purview of the Sherman antitrust act; it is collateral to it. It is the same as the combination between locomotive engineers not to work for the railroad company unless they would pay them certain wages. They say that is outside of the scope of the Sherman antitrust act.

Mr. MARTIN. We have the advice of some very able counsel who tell us that it is absolutely in violation of the law, and we are endeavoring to get action upon the case, and we believe we will.

Mr. LITTLEFIELD. What did you present to the Department of Justice, briefly, on that proposition?

Mr. MARTIN. We presented the facts as to the nature of the combination in restraint of trade in that case, the Eastern Railroad Association, and some of its operations.

Mr. LITTLEFIELD. Did you furnish the names of the witnesses by which the facts could be proven, and all that sort of thing?

Mr. MARTIN. Yes.

Mr. LITTLEFIELD. How long ago?

Mr. MARTIN. I think the first presentation was made at least four or five years ago, perhaps prior to that.

Mr. LITTLEFIELD. Have you been at work on it ever since?

Mr. MARTIN. Yes, sir; upon reflection it was more than seven years ago.

Mr. LITTLEFIELD. What does the Department of Justice, in substance, say to you?

Mr. MARTIN. In some cases—we have a record of what they say.

Mr. LITTLEFIELD. I mean briefly.

Mr. MARTIN. We will file that with the committee.

Mr. LITTLEFIELD. No, I mean just in a general way.

Mr. MARTIN. In some cases they refused to act, and in the case of Mr. Knox he did not do anything at all, but sent one letter back without any answer. Mr. Knox was a defendant himself.

Mr. DAVENPORT. Did you present any other aspect of the matter than the fact that the combination operated to discourage inventors?

Mr. MARTIN. It operated to rob the inventors of their inventions.

Mr. LITTLEFIELD. Did you present any other facts except those?

Mr. MARTIN. We presented evidence to show that it tended to monopolize and restrain interstate trade in inventions. It tended to corner the market, shut the inventor out of the market, and deprive him of his opportunity to sell.

Mr. DAVENPORT. The Supreme Court would shut you out, and perhaps Mr. Knox had in mind what the Supreme Court had expressly held.

Mr. MARTIN. We had the opinions of abler lawyers than Mr. Knox, that the combination was in violation of law, and all we wanted was a chance to test it. We had ample facts to test it, but he stood there and locked the door to justice which we thought we should receive, and that is one of the things we think ought to be corrected by an amendment of the law.

Mr. DAVENPORT. If you amended it as to that it would be clearly unconstitutional. If you amended this act so as to take in what you say it would not be worth anything.

Mr. MARTIN. We are told by some of the ablest counsel in the United States that it would be a better act than it is now.

I herewith submit to be included in the record, the opinions of United States Senator William E. Chandler and Senator George Turner, who are quite as eminent lawyers as the then Attorney-General, and they both hold the Eastern Railroad Association to be a lawless trust.

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*Opinion of United States Senator George Turner.*

UNITED STATES SENATE CHAMBER,  
Washington, D. C., May 17, 1902.

H. B. MARTIN, Esq.,  
*Secretary Antitrust League, Washington, D. C.*

DEAR SIR: From the papers submitted to me it appears that the Eastern Railroad Association is a trust formed by several hundred railway companies operating east of the Mississippi River, whereby each company contributes to a fund controlled by trustees, engages to be bound by the action of the trustees, and to do nothing whatever in the matters committed to the said trustees, and under and by virtue of the trust agreement the fund thus created is to be used by the trustees:

First. To investigate concerning the validity and utility of all patents granted for improvements and devices to be used in connection with the operation of the railways.

Second. To defend all suits brought by patentees against railways, members of the trust, for using any such improvements and devices.

Third. To compromise such suits when, in the opinion of the trustees, the patent is valid, provided the sum paid by the way of compromise be not more than it would cost to litigate the suits.

Fourth. When patent rights are found to be both valid and useful, to negotiate and purchase the same for the benefit of the members of the trust, and upon such terms as the trustees may determine.

The companies agree that they will not negotiate or deal with patentees either in the matter of purchase or by way of compromise for illegal use, but that all such negotiation and dealings shall be by the trustees. The effect of the agreement is far-reaching, as a moment's reflection will readily show, upon the value of the property of patentees and upon their ability to vend the same throughout

the several States covered by the agreement. The patentees, as to all such States, are reduced to the necessity of dealing with a single purchaser. This purchaser is armed with a large fund to fight in the courts all patents which it can not purchase on its own terms. It is an impudent bully, which takes any property that it pleases upon such terms as it pleases, and is armed with a club to beat its victims to death if they decline to submit.

Since the trust is interstate in its scope and operations, has for its object the restraint of trade in patent rights, is created by contract, has taken and maintained the trust form, and is, moreover, a criminal conspiracy at common law, thus presenting all the features denounced by section 1 of the act of July 2, 1890, it necessarily follows that it is illegal if, first, a patent right is property which may be said to enter into and form a part of trade and commerce, and, second, if a combination to lower the value of property entering into interstate commerce is as much "in restraint of trade" within the meaning of the act of 1890 as a combination to raise the value of such property would be.

It does not require either profound consideration or an extended examination of authorities to see that the question of the correctness of both the foregoing subjunctive propositions must be answered in the affirmative.

First. A patent right is property. It is created by statute, and the freedom of vending it in all the States is declared by statute. The fact that it is incorporeal in character and intangible does not change its character as property. Justice Davis, of the Supreme Court of the United States, in *Ex-parte Robinson* (2 Biss., 309), uses the following language concerning the character of patents and the free right to vend them within the United States:

"The property in inventions exists by virtue of the laws of Congress, and no State has a right to interfere with its enjoyment or to annex conditions to the grant. If the patentee complies with the laws of Congress on the subject he has the right to go into the open market anywhere within the United States and sell his property."

Inventions secured by patents have been specifically declared to be property by the Supreme Court of the United States in the following cases:

*Brown v. Duchesne* (19 How., 197).

*Cammeyer v. Newton* (94 U. S., 225).

*Densmore v. Schofield* (102 U. S., 375).

*Soloman v. United States* (137 U. S., 346).

Being property, and the right to freely vend them in the several States being secured by statute, why are not patented inventions as much within the spirit and purpose of the act of 1890 as any other species of property? It is impossible to conceive of any reason why they are not. There is no such reason. Indeed, as to many tangible articles of property covered by patents the patented idea involved in and connected with them constitutes a great part of their value, and in some instances the greater part. The protection which the law carries for such articles against combinations in restraint of trade therein is a protection for both the value of the articles considered simply as manufactured articles and the value of the patent right which inheres in and belongs to them. We see, then, that the law does include within its purview the patent right when connected with tangible, physical property, and it is impossible to conceive why it should not be taken to include the patent right when disconnected with the tangible, physical property.

Second. Is it not a combination to lower the value of property entering into interstate commerce "in restraint of trade" within the meaning of the act of 1890? The evil most in the public mind at the time of the passage of that act was the existence of trust combinations formed to increase the price of manufactured articles, but that combinations might be formed for the opposite purpose could not have escaped the intelligence of Congress, and that combinations and conspiracies had existed in the past for that purpose and constituted indictable crimes at common law was well known to the Members of both Houses. The terms of the act are general. They are "every contract, etc., in restraint of trade or commerce among the several States," etc. Since it is as much in restraint of trade to depress the value of articles of property as it is to enhance them, and indeed more so, and since the history of the law showed that conspiracies for the first purpose were as likely to occur as conspiracies for the second, and that they were equally as injurious as the second kind, it is impossible, in view of the broad and comprehensive language employed, to conclude that Congress did not have both kinds of contracts and conspiracies in

view. It is true that only contracts and conspiracies of the second kind have been before the courts since the passage of the act of 1890, but that is no argument against the view here taken. The law has been in force a comparatively short time, and it requires much time for cases involving every phase of any law to arise and be adjudicated. It may be observed, however, of these cases, which have been adjudicated, that the reasoning on which the judgments proceeded was as applicable to the one case as the other, and that in none of the opinions is there the most remote suggestion that the law was not intended to cover both classes of cases. Can anyone doubt that if all the grain dealers in the United States should enter into a combination to commit the purchase of all corn bought in the United States to the hands of one firm or corporation, thereby compelling the farmers, whose necessities compel them to sell, to sell at any price this firm or corporation might fix, that such combination would be declared to be in restraint of trade and commerce within the meaning of the act of 1890? If such a combination would be in restraint of trade and commerce, then this combination is in restraint of trade and commerce. The only difference in the two cases is one of degree in the number of individuals affected and the public injury inflicted.

These considerations do not appear to have occurred to Acting Attorney-General Whitney, Attorney-General Olney, or Attorney-General Griggs, when they declined to intervene against this trust combination at the request of Mr. Tubman. Mr. Whitney contents himself with declaring that he did not think a "combination of present consumers of a given commodity effects a restraint or a monopoly of trade or commerce within the meaning of the act." Why such a combination does not have such an effect he does not undertake to show, unless his general statement that a patentee is the owner of a monopoly, and that the railroads are the sole consumers and the patentee the sole producer, can be taken as a reason in favor of his contention. The considerations stated by him appear to be entirely foreign to his conclusion. The latter is a complete non sequitur. Attorney-General Olney does not discuss the questions involved at all, and it is evident that he gave them only perfunctory consideration, if he gave them any consideration. Attorney-General Griggs evidently did not see the features of this combination which enabled it to kill competition and to control at will the prices to be paid inventors for their patented inventions. He speaks of it as if its sole purpose was to keep in touch with new inventions affecting railway business and to examine and report concerning their validity, utility, and value. He does make one statement which bears on the subjects I have been discussing, but it is nothing but a bare statement, and, moreover, it is palpably incorrect. He says "If his patent is valid there can be no competition." There can be competition between railways for the purchase of valuable railway patents. Suppose there was only one line of railroad from the Atlantic to the Pacific coast having the right to use the Westinghouse air brake; would not that line of railway have a great advantage over its competitors in the matter of passenger traffic; and if such a patent right were put up for sale for the exclusive use of one of two or more competing lines of railways, would there not be keen competition for its purchase? If the free right to vend patented inventions were not broken down and destroyed by this combination, there would be such inventions for which rival lines of railways would compete.

I have not thought it necessary to quote from the contract by which the Eastern Railroad Association was formed. That contract and the constitution and by-laws of the association made to carry it out shows its objects and purposes to be what I have stated. If I have committed an error it is in understatements rather than overstatements. Neither have I deemed it necessary to quote from, or refer to, the several cases construing and applying the act of 1890. They are too well known to the profession to require more than the mention I have made of them.

In conclusion, I think that the question of the character of this association may well be again submitted to the Attorney-General for examination, and for the action of the Department after such examination, with the confident hope and expectation that that examination will induce a different opinion, and cause different action to be taken from that reached and taken when the matter was before under consideration in the Department of Justice.

Very respectfully,

GEO. TURNER.

*Opinion of United States Senator William E. Chandler, March 24, 1902.*

A combination of all or a large number of railroads to contest patents on all articles required for railroad use in which each railroad agrees not to settle with any patentee without the consent of a committee of the combination; nor while any claim is pending against any other member of the combination, and by which the combination agrees to defend all suits against each railroad and to pay the expenses of such defense and pay any judgments which may be recovered, is an illegal conspiracy in restraint of trade under the act of Congress of July 2, 1890 (26 Stat. L., 209).

The object is to enable the combination to control and fix the prices to be paid as royalties upon all inventions, and does not allow each railroad to make its own settlements with the patentees. It is a conspiracy to get lower prices for what the combination buys as contradistinguished from a conspiracy to get higher prices for what a combination produces and sells; and both are obnoxious to the law against monopolies.

Patents are property created by express national law. A patented article has attached to it a special value growing out of the patent. Congress having decided that it is for the public good that inventive genius shall be stimulated by patent monopolies, all patents and all patented articles are proper subjects of trade and commerce, and as such are protected by all the laws which protect other merchandise. If it is desirable that they shall exist, it is desirable that there shall be unhindered trade therein, and such trade can not be lawfully lessened by combinations and conspiracies to diminish the value thereof through lawsuits, to fix the prices which shall be paid therefor, and to otherwise prevent free traffic therein.

The railroads can no more combine to fix low prices which they shall pay than an association of patentees can combine to fix high prices which they shall charge.

The fact that the patentees are for a limited period monopolists gives no right to the railroads to establish an illegal combination to limit the monopolies. Congress can abolish patents; the railroads can not.

All the above propositions seem clear and not doubtful. The facts in the case of the Eastern Railroad Association are all of record in their own books and reports and are too plain to need recital. The association is formed expressly for the purpose above supposed, and for no other purpose. To be sure, it is stated that its object is only to resist illegal patents, but that recital does not change the avowed purpose to allow no patents to be settled for by any one member of the association except with the assent of a committee of all the railroads, and to defend any claim against any member and to pay the expenses and the judgment, if any is recovered. The Joint Traffic Association contended that its object was not to fix and maintain unreasonable rates, but only rates which should be reasonable. The subterfuge did not avail with the Supreme Court, and the subterfuge that the open combination of all the railroads to control the settlements for all patents is only intended to apply to illegal patents will be equally worthless.

It is difficult to believe that an illegal combination so plain and evident should have existed during all these thirty years last passed. It can not be doubted that the President and the Attorney-General, when they know the facts, will act with as much promptness and vigor as they have in the case of the Northern Securities Company, where the facts and the law are not so clear and plain as in the present case, because in the first the purpose is not stated in words, while in the latter it is openly and expressly avowed.

The foregoing opinion is given in full view of the letter of Acting Attorney-General E. B. Whitney of August 23, 1893, and the letter of Attorney-General Olney of December 11, 1893. Those gentlemen were members of Mr. Cleveland's Administration, and, like Attorney-General Judson Harmon, were doubtless influenced in their opinion by their close relations to their President, of whom Mr. William J. Bryan on March 21, 1902, spoke as follows:

"For four years he stood between the people and reform; for four years he made the White House the rendezvous of cunning and crafty representatives of predatory wealth; for four years the corporations and syndicates controlled his Administration."

Insensibly to themselves, perhaps, Mr. Whitney and Mr. Olney were controlled by surroundings like these; and Messrs. McKenna and Griggs mis-

takenly refused to reverse the decisions of their predecessors, doubtless overcome by the lingering malaria of the late Administration. But there is no such atmosphere now in the White House or in the Department of Justice. President Roosevelt and Attorney-General Knox are the friends of the people and reform and not representatives of predatory wealth, and it is impossible that they should not suppress a combination so evidently illegal as that of the Eastern Railroad Association.

WM. E. CHANDLER.

Mr. LITTLEFIELD. If what could be done?

Mr. MARTIN. Broaden the antitrust act so that the individual citizen can, in the Federal courts, seek redress himself.

Mr. LITTLEFIELD. The individual citizen can now if he is individually injured. But do you mean the individual citizen starting the machinery of the courts?

Mr. MARTIN. Yes; and still further, so that the individual district attorney in any part of the United States can proceed without the direction of the Attorney-General.

Mr. DAVENPORT. If you broaden the Sherman antitrust act so as to bring within its prohibitions the things that are covered now and such a thing as you propose, the act would not be worth the paper it was written on.

Mr. MARTIN. That may be your opinion, but we have the opinions of very able counsel to the contrary.

Mr. LITTLEFIELD. That is, you take stock in what you pay for?

Mr. MARTIN. Not necessarily.

Mr. LITTLEFIELD. If you did not, you would not continue to hire the man, would you? You would hire other men if you did not get the kind of advice you wanted.

Mr. MARTIN. We have sometimes had good advice from very eminent members of the bar that we did not have to pay very much for, they being patriotic citizens and in favor of enforcing the law.

Mr. LITTLEFIELD. We have a saying in the profession that sidewalk advice is not very valuable.

Mr. MARTIN. We found it so a good many times.

The question was asked as to whether we had made complaints to the Department against any particular trusts, and I mentioned this one, the Eastern Railroad Association, and we also complained against the Standard Oil Trust, and we were very pleased to see the Government taking lively action in the case of that combination. We also made complaint against the Steel Trust, and the Government has not taken any action in that case. Also against the Armor Plate Trust, in which they did not take any action, even to the extent of keeping the Armor Plate Trust attorney out of the Attorney-General's office.

Mr. LITTLEFIELD. What is the organization you represent, and what is its purpose?

Mr. MARTIN. The American Anti-Trust League, and its purpose is to secure the enforcement of the law against trusts and combinations, and to eventually abolish all trusts and combinations and to secure economic liberty for all the people.

Mr. LITTLEFIELD. How widely diffused is the organization?

Mr. MARTIN. It is diffused to some extent in most all the States in the Union.

Mr. LITTLEFIELD. Do you have local organizations?

Mr. MARTIN. Yes, sir; in the various cities and States.

Mr. LITTLEFIELD. How many people do you have in your membership?

Mr. MARTIN. Our membership is a voluntary membership, not measured by the payment of per capita tax, as in many organizations; it is an organization more open, as you may say; that is, being an entirely voluntary association, the members merely enroll, all subscribing to the principles of the organization, and enrolling. We do not collect a per capita tax. The organization is supported by the voluntary contributions of its members. It is more, in its general skeleton organization, like a political party, which its members are free to manage to suit themselves in their different localities.

Mr. LITTLEFIELD. How many of such members do you have?

Mr. MARTIN. I presume we have in the neighborhood of 150,000; somewhere along there. The membership, of course, being loosely organized, it is impossible to keep track of the exact membership, but we hope ultimately, with the rapid progress of public sentiment, that we will have a majority of the people in the United States voting for all we want, and that is the main purpose we have in view. Our organization is formed for the purpose of securing a large enrollment, not for the per capita tax, but for the purpose of enforcing the law against trusts and abolishing those institutions.

Mr. LITTLEFIELD. Do you have any formal organization, by-laws, or anything of that kind?

Mr. MARTIN. Yes; we have a constitution, by-laws, and declaration of principles which set forth our purposes.

Mr. DAVENPORT. Was your organization invited to this celebrated trust conference in Chicago?

Mr. MARTIN. I presume, likely, that some branches of it were. I will not be sure whether I was invited or not. I think I had some correspondence with some of the gentlemen connected with it. How do you define that as an "antitrust conference?"

Mr. LITTLEFIELD. What was that, Mr. Marburg?

Mr. MARBURG. A conference on trusts.

Mr. MARTIN. I would like to ask this privilege, to insert, as a part of my remarks, such part of the constitution and by-laws of the Eastern Railroad Association as might be material.

Mr. LITTLEFIELD. Make an abstract of it.

Mr. MARTIN. Now, Mr. Chairman, one other point in regard to this matter of this proposed amendment that we object to as antitrust men very strongly in behalf of the antitrust league, is that it proposes, after a certain length of time, that there shall be immunity granted to past defendants. We object very strongly to that. The fact is that many of these past and present offenders against the act are so powerful, their operations have been so secret and so well concealed, that it is a very difficult operation on the part of the Government to collect and arrange the evidence and secure the arrest and conviction of the offenders, and we believe that any such a limitation as that would be very dangerous to the proper enforcement of the law. The men who violated this law in the creation and organization of trusts did it not as men ignorant of the law; they did it on the advice of counsel, perhaps, a good many times, and they are not in a position to plead the excuse of ignorance of the law, and they should be made to stand the punishment, if there is any possible way to punish them. They have shown hardness of heart, a disposition not only to violate the law



in the first instance, but to continue to defy the Government to punish them.

Mr. LITTLEFIELD. In your opinion, there are no equities that operate in their favor?

Mr. MARTIN. That is saying it pretty broadly. I would not want to say that there was any sinner without any privileges whatever. The law does not provide capital punishment, and the enforcement of its provisions would be none too severe when you take into consideration the nature of the offenses that the violators of the law have been guilty of in the organization of these trusts.

Mr. EMERY. I noted in your objection just made that you have not, apparently, criticised, at least adversely, the seventh section of the bill, providing for the reduction from treble to double damages. Is your organization in favor of that?

Mr. MARTIN. No; we would not be in favor of that.

Mr. MARBURG. Mr. Martin, do you think that there is no combination in restraint of trade that ought to be allowed, that is to say, every combination in restraint of trade is injurious to the public?

Mr. MARTIN. I think that is as near the truth as it could be stated. While I am not acquainted with any combinations in restraint of trade that are not injurious, I have heard oftentimes mention made of good trusts and bad trusts, but the only ones that I know are bad trusts, and we have in our organization a pretty extensive acquaintance with them.

Mr. DAVENPORT. Have you in mind, when you speak of this Eastern Railroad Association being a trust, that it is a trust under the laws of the States or that it is a trust covered by the Sherman anti-trust act?

Mr. MARTIN. Yes, sir; I understand that it is a trust within the purview of the Sherman antitrust act. It operates in restraint of commerce in inventions, not only to the improvement of the railroad service, but very injuriously to the safety of life and limb of the traveling public. There are many inventions that would add greatly to the saving and prevention of accidents which have destroyed great numbers of lives and inflicted great injury, that would to-day be in use upon the railroads of this country had it not been for the unlawful operations of this Eastern Railroad Association. The general public have a great interest in the destruction of this combination.

Mr. STEBBINS. Will you pardon me just to make a statement? The constitution and by-laws of the Eastern Railroad Association were submitted to Senator Hoar. He read them over very carefully, and he told me that, beyond the shadow of a doubt, the association operated in violation of the antitrust act; and furthermore, as I understand, as it has been reported to me, when the question of Attorney-General Knox's confirmation came up in the Senate, Senator Hoar took up these papers and held them in his hands, and said:

Here is a case that is clearly within the law and Mr. Knox has not commenced a suit against this combination.

That was reported to me personally by a Senator.

Mr. DAVENPORT. The purposes of the association, briefly stated, are:

SECTION 1. Whenever, in the opinion of the executive committee, a patent submitted for examination by any member is valid, or whenever it is deemed inexpedi-

ent to contest any claim made upon a member of the association for the use of a patented invention, it shall be the duty of said committee, at the request of any of the associate members, to negotiate either for the use of said patent, or for a settlement of the claim preferred, and when effected, to report the same to each associate member for acceptance.

SEC. 2. If any member declines accepting the basis of settlement so offered (and a failure to acknowledge receipt of said notice for fifteen days after its date, shall be deemed an assent to the terms thereof), the association shall not be responsible for the defense of any suit, or for the expense of any litigation against that company and growing out of that case, incurred subsequent to date of said notice.

SEC. 3. Whenever a suit is brought against any member of the association for infringing upon a patent reported upon as valid, and whenever a claim is made against any member for the use of a patent reported upon as valid, and for which a basis of settlement has been agreed upon as aforesaid, it shall be the duty of that member to make report of that suit or claim to the secretary, and thereafter the said committee shall manage the same at the expense of the association: *Provided*, The member so reporting has not previously declined, or shall not subsequently decline, such basis of settlement as has been or may be recommended by the executive committee.

SEC. 4. Members of the association shall not settle any suit or claim against them after being advised by the secretary that a similar suit or claim is in charge of the association for defense in behalf of any of its members, without the consent of the secretary, indorsed by the president.

In other words, this association is formed for the purpose of protecting the association from suits against it for the the use of patented appliances, either as being infringements or as being invalid. What I can not bring my mind to see is how that is an arrangement in restraint of trade. It is exactly the same as that large class of cases covered in the case of *Hopkins v. The United States* and *Anderson v. The United States*, in 171 U. S., where they say that those things are collateral entirely to interstate trade, and that they are not within the prohibition of the law, and where they intimate very decidedly that if Congress undertook to prohibit such combinations which had effect only indirectly at the most, it would be beyond the constitutional power of Congress. What is there about that combination which brings it within the scope of the power of Congress? We all know that in the origination of this Sherman antitrust act attempts were made originally to approach the thing from your standpoint, and that the Congress advanced all that and said, "Here we will exercise the whole power that Congress has over the subject. We will do it in the same way that we would prohibit these combinations, just the same as the Constitution prohibits action by the States, and we will avoid all these difficulties." I would like to have Mr. Stebbins point out to me wherein that comes within the scope of the interstate commerce clause.

MR. STEBBINS. The Eastern Railroad Association report for 1878 and 1879 gives some matter relating to the force and meaning of its constitution and by-laws. The first constitution and by-laws, I think, were adopted some time in 1868 or 1870. In its second constitution and by-laws, article 9, is a reference to the assessments which were to be made upon all the railroads annually, according to their mileage and gross receipts. The latter part of the article reads:

"When said assessment is made, to pay him the sum so assessed upon it, and that said treasurer may maintain an action in his own name against each of said companies severally for the assessment as aforesaid made upon it."

They never could enforce that, of course; anybody knows that. So, in the next constitution they left that clause out. That fact

is a recognition that the combination was illegal at common law. In explaining this new constitution the president makes these remarks:

Section 4 prohibits any member settling any suit or claim brought against it, after being advised by the secretary that a similar suit or claim is in charge of the association for defense in behalf of any of its members, without the consent of the secretary indorsed by the president.

This provision of the constitution may appear tyrannical, and it does to a certain extent deprive members of the liberty of individual and independent action in the settlement of claims; but the subject has been well considered, and the rule is believed to be essential to the successful carrying out of the main object of the association, to wit, the protection of its members against unjust claims made for patented inventions.

One member may find it expedient to settle a claim under special inducements; but the money thus paid enables the party making the unjust claim to prosecute other members, which in most cases he would otherwise be unable to do. Again, the weaker members of the association might be unduly influenced in the settlement of such claims when they learned that a more powerful member had found it expedient to settle.

Such methods of influencing the settlement of claims are well known to those engaged in the manipulation of fraudulent patent claims, and, if allowed to prevail, the influence and salutary effect of the association would be destroyed. To obtain the best results the members of the association must act as a unit, and it is believed that this unity of action has been the true cause of our success heretofore.

I do not need to read any more than that. As far as its being a conspiracy, that is proven by their own words. An inventor secures letters patent for a railway appliance, and he makes preparations for manufacturing and selling it. Then the railroads, some of them, see it and put it in use. Suppose the Maine Central puts a patented thing in use, for I know of a case of that kind, or another railroad in some other part of the country, the New York, New Haven and Hartford or the Baltimore and Ohio. The inventor sees his invention in use and he writes to the several companies stating that they are infringing his patent. What do they do? They simply refer him to the counsel of the Eastern Railroad Association. He tries to sell to different companies, but none of them will buy of him. He can not sell to the companies who are infringing. Now, notice has been sent out to every railroad this side of Pittsburg not to trade with this man, to boycott him, have nothing to do with him. The railroads may go on and use the invention or they may cease to use it, just as it pleases them. If the inventor resides in the District of Columbia or in one of the States and attempts to make sales or even to sell the right to use, or grant a license, there is, under the circumstances, a restraint of interstate trade, there is a boycott upon him, just as clear as can be.

Mr. DAVENPORT. I can see clearly that that might be within the prohibitions of the law, but, now, take a concrete case. Suppose Congress should pass a law prohibiting the railway engineers from forming an association for the purpose of increasing their wages. Do you think that such a law as that would be of any constitutional validity because of the fact that it is outside of interstate traffic? Or take this case: Suppose all the manufacturers in the United States who were accustomed to sell goods in other States should enter into an agreement among themselves that they would not use a particular patented machine in the manufacture of their goods, which goods go into interstate commerce, would you consider that that would be within the purview of the Congressional power?

Mr. STEBBINS. If they should agree not to trade with anyone generally.

Mr. DAVENPORT. This is another proposition.

Mr. STEBBINS. No; that is what they do here. It is very evident what the scheme is. If they will not trade with him, of course he is helpless. Suppose the inventor commences a suit in equity. The association's counsel conducts the defense, manufactures evidence, and does all manner of things to wear him out in the courts.

Mr. DAVENPORT. I can see that that might be in violation of the State law.

Mr. STEBBINS. If he gets a decree and the matter goes before a master, he can not prove any damages or profits. The amount that he would receive for a license, or the royalties, would be the measure of damages. But by their agreement they refuse to buy any license, consequently there is no measure of damages. They have restricted his interstate trade so no damages can be proven. What is the result of a lawsuit? Just the same. There was a case recently tried over in Pittsburgh, the only lawsuit on a patent that I have heard about for fifteen or twenty years. A man in West Virginia made an invention relating to locomotive fire grates, and he tried to introduce it on the Baltimore and Ohio, Pennsylvania, New York Central, and other railroads, but he could not do anything with these roads. One day he was looking around and saw his invention in use on a Baltimore and Ohio locomotive, and further investigation showed it was very extensively used by the Baltimore and Ohio, New York Central, and Pennsylvania railroads. He finally got a lawyer interested, who lived in Newcastle, Pa.

The patent had expired two years before, and of course he could not institute a suit in equity for an injunction, so he brought a suit at law. Upon the stand he was asked: "Did you ever grant any license to any railroad?" He answered "Not any at all." "Then how have you been damaged?" He said "It has been put in use extensively," but of course counsel for the defense objected to that and the judge sustained them. He could not introduce evidence to show that he had been damaged at all in the absence of royalties and licenses. Other witnesses were placed upon the stand to prove the same fact, the extensive use of the invention, and I think the judge ruled out the testimony. The case was given to the jury, and I believe it brought in a verdict of six cents. That is the way it always turns out. It was possible for him to collect only 6 cents. He took the case to the court of appeals on writ of error, and that court decided that in the absence of royalties and licenses other evidence was admissible to show the value of the invention, and a new trial was directed. To show how the decision affected this association, note what was done. The general counsel for the association filed in the Supreme Court a petition for a writ of certiorari, No. 453, and it was considered last fall and was dismissed. That is the way it turns out with every inventor of a railway appliance. The new trial will be fruitless for the inventor.

Mr. DAVENPORT. That was not brought under the Sherman anti-trust law.

Mr. STEBBINS. No.

Mr. DAVENPORT. I can see myself that if people in different States bind themselves together not to buy a thing of a man that the com-

bination might be in restraint of trade between the States; it begins to dawn on me a little.

Mr. STEBBINS. You remember Justice Holmes's dissenting opinion in the Northern Securities case. His first class of cases was where individuals agree together to restrain their own trade. There is no valid consideration. One restrains his own trade in consideration of the other restraining his trade. This Eastern Railroad Association agreement is one of that class of cases, it seems to me, beyond the shadow of a doubt. The real purpose of this scheme is to get inventions and not pay for them, or to suppress their use entirely. What has been the result? Life and labor saving devices have not been introduced upon railroads as they otherwise would have been. If there had been free competition, an open market, you would find all sorts of improved safety appliances in use to-day. But for these unlawful associations there would have been no necessity for Congress passing the act in regard to the compulsory use of couplers and power brakes.

Mr. DAVENPORT. I can see myself that there is a principle there. If they combine together not to buy of a man for the purpose of destroying the market that might be in violation of the Sherman antitrust act.

Mr. MARBURG. Under the bill as we propose to amend it, if it were shown to the Commissioner of Corporations that this result which you name was the aim of this association and it was the actual result of the working of this association, in your judgment, would not the Commissioner of Corporations interpret such an agreement as an unreasonable restraint of trade?

Mr. STEBBINS. I do not know how he would decide; probably he would not; there would be influence brought to bear upon him and he would likely give a clean bill of health.

Mr. LITTLEFIELD. You do not seem to have that implicit confidence in his unerring accuracy.

Mr. STEBBINS. I have aided inventors and been with them to Attorneys-General Olney, Harmon, McKenna, and Griggs. No relief could be secured from them. There was certainly some influence at work. It was very evident. One man whom I was helping called upon me one day and wanted me to go up to the Attorney-General's office with him. We tried to see the Attorney-General and were referred to Solicitor-General Richards. We could not touch him with a 10-foot pole. I said "I will call on him alone." On the way to the Attorney-General's office at another time I met the Hon. Jeremiah Wilson, whom I suppose you know, and I told him where I was going, and he said "I will go along with you." We went up there and saw Richards. Mr. Wilson knew about this stealing of inventions and did a good share of the talking, but he could not make any impression on Richards. The fact of it is, I suppose the association had some very able counsel, and it is my opinion that Elihu Root has been their consulting counsel for many years, and that he still is, and that he and W. D. Bishop were the persons who drafted this constitution and by-laws. That is my opinion, and I think I could advance some reasons for holding that opinion.

Mr. DAVENPORT. On the face of it the real purpose seems to be disguised, I must say, if the facts are as you have stated, if that does not come as close to the principles in Montague against Lowery as anything could do.

Mr. STEBBINS. Mr. Chairman, from my study of the decisions I think that any combination that is in direct restraint of interstate trade or commerce, and for that purpose, is within the purview of the act. If the restraint is only incidental to the main purpose of the contract or agreement, then it is not within the act.

Mr. MARBURG. I would like to have you answer this question, Mr. Stebbins. Can you say whether, in your opinion, this agreement of the Eastern Railroad Association is in reasonable or unreasonable restraint of trade?

Mr. STEBBINS. The words "reasonable" and "unreasonable" are adjectives; they have no signification whatever unless applied to some state of facts.

Mr. MARBURG. In view of the state of facts you have set forth, is this agreement in reasonable or unreasonable restraint of trade?

Mr. STEBBINS. I should say that, inasmuch as it is directly in restraint of interstate trade and for the main purpose of restraining interstate trade, it is unreasonable. Reasonableness or unreasonableness is not the test. Those words are adjectives which are applied to a state of facts. I think that anyone in passing on these cases does not think of reasonable or unreasonable. Attention is directed to the state of facts, what the intent or purpose of the contract or the combination is. What are the contractors after? What is in their minds? Are they after something that is incidentally in restraint of interstate trade, or are they getting up a scheme for the purpose and object of restraining interstate trade and fixing the price so they can get more—get something for nothing.

I will go a little further. I do not agree with some remarks that were made about the labor organizations. If the labor organizations make any contract or combination in direct restraint of interstate trade, of course such contract or combination is a violation of the law; you can not get away from that. There is something to be said as far as the enforcement of the law is concerned, in favor of the labor unions. They have been discriminated against without any doubt. Take the American Railway Union case. When Attorney-General Olney came into office there was trouble up near Buffalo.

There were some lumber handlers, I think, on strike. The owners of the lumber wanted Attorney-General Olney to bring suit under the antitrust act, but he would not do so. He said the law was not intended to apply to labor unions. When the strike of the American Railway Union came on at Chicago he thought otherwise. He appointed an attorney of one of the twenty-two railroads that were in combination there—twenty-two general managers were in a combination—as a special United States attorney to file a bill in equity, and one of the grounds, the main ground for asking relief, was that the union was violating the antitrust act. He did not bring any suit against the general managers under the law, and of course that is where he discriminated against the labor unions. When the case in re Debs, came before the United States Supreme Court, Attorney-General Olney made the argument, and he very carefully avoided any reference to the Sherman antitrust act until he reached the very end of his argument. Then, in a sneering tone—I heard it myself—he said in substance: "In regard to the Sherman antitrust act, that is a mere experimental piece of legislation, and we will not go into it." He was willing to use the antitrust law against the labor men, but he

would not use it against the General Managers' Association. Carroll D. Wright, an ex-commissioner of labor, specially pointed out that the General Managers' Association had no standing. The fault is not in enforcing the law against labor unions, but in discriminating against them.

Mr. EMERY. Do you think the Attorney-General was moved in applying the Sherman antitrust act, that is, through the attorney who first brought the action in Chicago, by any animosity against organizations of labor, or do you think he discriminated against them in favor of this railroad organization?

Mr. STEBBINS. I know that he was counsel for the Boston and Maine Railroad and the Boston and Lowell. He was consulting counsel for the C., B. & Q.

Mr. MARTIN. That was one of the roads directly involved in the trouble.

Mr. EMERY. I want to ask, in connection with the remarks about Mr. Olney, if you have noted, in recent years, perhaps for the last eight or nine years, that Mr. Olney has been one of the most frequent contributors to magazines like the American Review of Reviews in defense of such combinations of labor?

Mr. STEBBINS. That amounts to nothing. Do not judge a man only by what he says, look and see what he is doing, because his acts, as a whole, are a revelation of his real opinions.

Mr. EMERY. That is a pretty strong externalization of his thought. On the other hand, did you notice the question I asked Mr. Martin as to whether or not he knew that Judge Grosscup had suggested, doubtless by the same discrimination that you have suggested, called the attention of the Federal grand jury to the alleged combination among the railway managers, and that such investigation was had at that time by the Federal grand jury which was then in session?

Mr. STEBBINS. Who knows who the district attorney was, or what he was doing. The Federal grand jury is controlled, a great many times, by the district attorney.

Mr. EMERY. In the absence of such knowledge on your part, why do you assume that it was so in that case?

Mr. STEBBINS. I looked up that case at the time, and I came to the conclusion that Olney did not act fairly. Why did he not bring suit against both the illegal combinations? What I tell the labor leaders is: "Do not get the law changed. Do not seek exemption." That is not right. It will never be done. What you want is to get section 4 amended so you can get into court on your own motion. Then you need not go up to the Attorney-General's office. If you have a fight with any illegal combination, make them take the same medicine they give you. That is fair all around, it seems to me.

Mr. LITTLEFIELD. That is, it is your idea that it puts the control of the machinery in the hands of the Department of Justice, where it ought not to be, exclusively?

Mr. STEBBINS. Yes, sir.

Mr. LITTLEFIELD. That is, you think that every citizen ought to have the privilege of moving under any criminal law the same as he does anywhere else?

Mr. STEBBINS. Of course, if he is aggrieved he can go to the district attorney and get before the grand jury, but it may not do him

any good. These parties who want the law changed, and who propose that all these organizations go before the Commissioner of Corporations and file their agreements, will attain the same end very effectually by amending section 4 of the law. Then, if they think any of their neighbors are in an unlawful combination or conspiracy, if they have the evidence, they can summons them right into court; they can have their agreement tested there without having it submitted to the Commissioner of Corporations. They get a judge to pass upon it then, and he will determine whether it is reasonable or unreasonable. That is the easiest way—to amend the law and to do right by all parties, by the corporations, railroads, and the labor organizations, and by the people at large—that is, give them all a chance to go into court, not put the cost of enforcing this law exclusively upon the Government. Let the individual citizen in Maine or in California, if he knows of a combination violating this law, and it is affecting his interests, be granted power to go into court and have it enjoined.

Mr. EMERY. You know that in the debates upon that very subject in the Senate a great deal of care was given to the explanation and defense of that particular provision?

Mr. STEBBINS. There was reference made to it in the House.

Mr. EMERY. By both parties in the Senate.

Mr. STEBBINS. Yes; but the idea in the Senate was that suits were going to be grave matters, and that they should not be intrusted for prosecution to an individual, not even to a district attorney. Senator George made the remark that for an individual to bring suit against one of these combinations was like a man, untrained in military affairs taking his shotgun and going out to fight a drilled army. The trouble with this section 4 is obvious to everybody. Suppose that a man seeks an injunction against this Eastern Railroad Association. The members are in the fifteen Atlantic Coast States. In the State of New York process runs throughout the whole State, and the same in Pennsylvania; so you see fifteen suits and one in the District of Columbia would be necessary. So to get complete relief he must bring sixteen suits. If the law were changed so he could institute suit under section 4, he could bring all defendants in, and get general relief in a single suit.

Mr. DAVENPORT. Proceeding in the name of the United States, do you think any law would be constitutional which deprived the President of the United States of the power to determine whether or not suits or criminal proceedings should be instituted in the name of the United States? Does not the provision of the Constitution which vests the executive power in the President give to him the decision as to whether or not proceedings in the name of the United States shall be instituted for the purpose of executing the law?

Mr. STEBBINS. In regard to the enforcement of the criminal law, that is one thing; this is a penal statute. Under section 4, Federal courts can issue injunctions to restrain crimes.

Mr. DAVENPORT. I am referring to proceedings brought in the name of the United States. I can see that the difficulties that exist on the part of the private individual going into a court of equity to protect himself, as I have tried to point out this morning, make it practically valueless because of the restrictions on the courts into which he must go. Now, you were going to say something about section 7.



Mr. STEBBINS. I was going to remark that in this class of cases, where a combination of railroads takes a man's inventions and boycotts him and uses the inventions he can not get any relief under section 7. The same trouble arises in regard to proving damages that arises under the sections of the patent acts, either the equity section or the law section. So, you see, suit under section 7 does not help him out at all, no matter how great his loss may have been, from the restraint of his interstate trade; he cannot collect anything under that section.

Mr. DAVENPORT. If he could prove some damages, it would be a good thing to leave the treble damages in.

Mr. STEBBINS. Certainly. I do not know whether you have looked up the matter, but you remember that in the statute, 21 James I, there was a provision for treble damages, and in the Zeno statute, 480 A. D., there was a provision, I think, for real or actual damages.

Mr. DAVENPORT. Of course in respect to treble damages, in a case in 115 U. S., the *C. B. & Q. v. Hume*, the Supreme Court sustains that kind of legislation and heartily approves of it for the reason that the individual attacking the road is at such a tremendous disadvantage.

Mr. STEBBINS. I should be pleased to read the statute of Zeno, because it applies as well to combinations of merchants as to combinations of laborers.

We command that no one—either of his own authority, or under sacred rescript or pragmatic sanction already obtained or hereafter to be obtained, or sacred allowance by our favor—dare to exercise a monopoly, whether of any sort of clothing, fish, shell-fish, sea-urchins, or any article else pertaining to food or any sort of necessary, or of any material of any kind; and that no one by illicit agreement conspire, or contract, not to sell any article of trade for less price than that which those thus agreeing shall have mutually established. Also, builders, contractors for building, and persons holding themselves out as mechanics of any other sort, as likewise bathing-house keepers, are wholly forbidden to agree with each other not to carry on work previously committed to another, or not to undertake any charge previously enjoined upon another: All persons being hereby authorized to complete without fear any work begun and left undone by another; and as well also to bring to justice all outrages as aforesaid—without fear and without judicial expense.

If anyone dare to exercise a monopoly he shall forfeit the whole of his property, and be condemned to perpetual exile.

Moreover, if hereafter chiefs (primates) of other callings, whether in fixing prices for things or in regard to any unlawful orders by them issued, dare to bind by contract such as give an assent thereto—we decree that they shall be punished by a fine of 40 pounds of gold: Your own office also to be condemned in 50 pounds of gold in case that upon the creation of any such prohibited monopolies or corporate agreements, the above most wholesome penalties imposed by us shall in any instance, whether from venality or subterfuge or in any other way, fail of being fully exacted

In view of what the President has said about the law being a crude and imperfect piece of legislation I wish to make this remark: The *Lex Julia de Annona* was copied into the Basilicon, Greek in one column and Latin in the other. This statute of Zeno was promulgated during the reign of Charles the Fifth, who then ruled most all of Europe. There was complaint about monopolies, and Charles consulted his great lawyer, Damhoderius, who went back and took the old Roman law, with some little changes, and the Emperor promulgated it throughout Europe. Then when Coke was fighting monopoly as an institution—that is different from the monopoly in fact—he went back and studied the old Roman law, and in most of his remarks he has in mind monopoly as an institution and not as a fact. When parliament came to pass the statute of 21 James the First, it was not

confined and restricted to those monopolies which had been instituted by law, but it applied to all of them; that is, to all monopolies in fact.

I happened to know that Senator Hoar went back and studied all these old laws. You will find in the Sherman antitrust law the triple damages; you will find it also in the statute 21 James the First. There was a provision, as I understand it, in this statute of Zeno for actual damages. The Lex Julia imposed very severe penalties, and it is a peculiar fact that in suits for cornering grain a slave's testimony was admissible, and it was the only class of cases in which a slave could testify, showing that monopolies were considered to be a great public menace.

Senator Hoar went back and studied the old laws and was familiar with them, and the triple damages in section 7 of the antitrust act was doubtless suggested by what he found in the statute of 21 James I. When a President of the United States, or any other person, states what has been stated in regard to this antitrust act, in view of the debates in the Senate and the pedigree of the law, and without any disrespect whatever, I feel like saying, in the words of Job, that "His belly is full of the east wind."

Mr. MARTIN. There is one sentence of this letter of Senator Edmunds that I wish to quote in the body of my remarks in support of the suggestion I made during my original argument.

Mr. LITTLEFIELD. Put the whole letter in.

Mr. MARTIN. It supports the contention I made that the great difficulty of the people is the lack of the enforcement of the law and not any fault in the law itself. He says:

AIKEN, S. C., January 2, 1903.

DEAR SIR: Yours of the 27th ultimo has reached me here. The statement of Senator Vest contained in the slip you inclose is correct. I have not the Congressional Record or the Senate files to refer to, but I am sure on looking them up you will find that the bill reported by Mr. Sherman from the Finance Committee was not the one passed by Congress, but that the one passed by Congress was reported by the Judiciary Committee to which the Sherman bill, after it was reported from the Finance Committee and discussed and probably more or less amended, was referred for consideration; and that the bill reported by the Judiciary Committee and passed was, in every essential respect, entirely different from the Sherman bill and was purely a substitute for it. The Judiciary Committee was, I think, unanimously of the opinion that the bill it reported was, in respect of its general scope, an exercise of the whole constitutional power of Congress, which could only legislate for the freedom and regulation of commerce with foreign nations and among the several States; and I am of the same opinion still. The only difficulty with the bill we reported, and which became law, was the want of administration; that is to say, that the law was and is entirely capable of putting an end to such so-called trusts and such combinations as interfere with or restrain commerce among the States, etc., if the officers of the Government having charge of the enforcement of law understand their duty and are willing to do it, being, of course, supplied with sufficient means to put it into force. If the famous Knight case had been instituted and carried forward with suitable allegations of the precise nature and history of the Knight affair, and had been supported, as it could have been, by adequate proof of the facts it set forth. I believe the Supreme Court of the United States would not have had the least difficulty in preventing the carrying on of the combination under consideration, and putting an end to it, as it can still do with similar ones. The bill of complaint in that case was unhappily not drawn in such a way as to present the question which now so much commands just public concern. What is needed is not so much more legislation as competent and earnest administration of the laws that exist. I have no doubt that the present Attorney-General and his very able assistant will find easy means, if supplied with the necessary funds, to arrest the progress and undo the mischievous work of such great and injurious combinations as have so largely come into recent existence.

Very truly, yours,

GEORGE F. EDMUNDS.

JOHN A. SLEICHER, Esq.,  
110 Fifth Avenue, New York, N. Y.

In conclusion, Mr. Chairman, thanking the committee for the courtesy extended to me and to our organization, we feel that this is a very grave and serious matter. This law is, in our judgment, from the terms in which it is set forth and from the experience that the people have had with it, a very valuable and important part of their government and should not be lightly changed. It is brief, simple, and comparatively easy to understand, and our organization, composed of business men, and employers, manufacturers, merchants, farmers, and labor men, organized and unorganized, believe that the wise and proper course for the laborers and the legitimate business men and the farmers is to unite their forces for a free field and a fair chance, free of the exactions and restrictions of monopoly, and that their forces should be united for the enforcement of this law fairly upon all, and for the destruction of these trusts and monopolies; that will benefit the business men, the laboring men, and the farmers, and whatever extension or amendment is made to this law, instead of weakening it, should be to broaden and strengthen it, if possible. The people are not afraid of bureaucracies built up in the shape of commissions to enforce the protection of their rights one-hundredth part as much as they fear the autocratic power of a few private men controlling the highways and the banks and the industries of the country in the clutch of monopoly. That is what they fear, and the Sherman anti-trust law, I believe, as Senator Edmunds stated, will protect them if it is honestly carried out by honest officials.

(Thereupon, at 5 o'clock p. m., the subcommittee adjourned until Saturday, April 25, 1908, at 10.30 o'clock a. m.)

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SUBCOMMITTEE OF THE COMMITTEE ON JUDICIARY,  
*Saturday, April 25, 1908.*

The subcommittee this day met, Hon. Charles E. Littlefield in the chair.

**ARGUMENT OF MR. JOSEPH NIMMO, JR., 1831 F STREET N. W.,  
WASHINGTON, D. C.**

Mr. NIMMO. Mr. Chairman, the antitrust act of July 2, 1890, is one of the most unfortunate legislative misadventures ever placed upon the statute books of the United States.

First. It was assumed at the time when it appeared as a bill in Congress that it applied only to commercial and industrial combinations, and mainly to department stores and combined industries. It never had that effect. No department store was ever indicted, and it is safe to say none ever will be. It has also failed in its application to combined industries.

Second. The words "railroad" and "railroad rates" do not occur in the statute; hence it was assumed that it had no reference to railroads or to railroad transportation. But the Supreme Court of the United States subsequently declared that it does apply to railroads almost exclusively.

Third. It was assumed that the act applied only to unreasonable or unlawful rates, as the act is entitled "An act to protect trade and

commerce against unlawful restraints and monopolies." But the Supreme Court of the United States ruled that the act repealed the common law of reasonableness and by the use of the word "every" included contracts and combinations of all sorts, whether reasonable or unreasonable.

It was the main intent of the law to conserve competition and to prevent combinations. It had just the opposite effect as it applied to railroads. It forced them to consolidate.

Fifth. The act is commonly known as the "Sherman antitrust act," but Senator Hoar, chairman of the Senate Committee on the Judiciary, declared in a speech in the Senate on January 6, 1903, that Senator Sherman "had nothing to do with it whatever."

Did ever any such series of misadventures attend any other act of Congress? I had a full and free conference on the subject with Senator Hoar, and he handed to me this copy of his speech in galley slips, which I hold in my hand. I prize it highly in remembrance of the great Senator. It is entitled "Speech of Senator Hoar, delivered in the Senate, Tuesday, January 6, 1903."

In this speech occur the following expressions:

We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase "in restraint of trade" had a technical and well-understood meaning in the law. It was not thought that it included every restraint of trade, whether healthy or injurious.

We were disappointed in one particular. The court, by 1 majority, and against the very earnest and emphatic dissent of some of its great lawyers, declined to give a technical meaning to the phrase "in restraint of trade," and held, in one important case, that if trade were restrained by an agreement it was no matter whether it were injuriously restrained or no. ■ ■ ■

The judicial history of the act is clearly stated in Senate Document No. 73, Fifty-ninth Congress, second session, the same being a "Reply of Attorney-General Knox, dated January 3, 1903, to a communication dated December 20, 1902, from the Hon. George F. Hoar, chairman of the Committee on the Judiciary of the United States Senate."

From this official record it appears that the first case tried under the "antitrust act of July 2, 1890," was the case of *United States v. E. C. Knight Company*—a sugar-trust case, involving a combination of sugar refineries assumed to be a combination in restraint of trade or commerce in refined sugar. But the Supreme Court of the United States held that it was not within the prohibition of the antitrust act, which related to commerce among the States, and that it was for the States to regulate production. This decision was rendered March 26, 1896.

This seemed to knock the whole antitrust act in the head, for it was still assumed that the act related only to commercial and industrial contracts or combinations.

But in the course of three years some fertile brain conceived the idea that perhaps the act applied to railroad combinations, notwithstanding the fact that the words "railroad" or "railroad rates" are not in the act. Accordingly, a case was instituted against the Trans-Missouri Freight Association. It was appealed from the district court of Kansas to the circuit court of appeals of the eighth district, both of which decided that the act does not apply to railroads; but the Supreme Court of the United States, on March 22, 1897, decided that the law does apply to railroads and that it prohibits all contracts in

restraint of trade or commerce among the States and with foreign nations, whether the restraint be reasonable or unreasonable—in other words, that it repeals the time-honored rule of the common law, which I have already characterized as misadventure No. 3. The opinion in this case was opposed by four great justices—White, Field, Gray, and Shiras—upon the ground that the only restraints condemned by the statute were unreasonable restraints,\* which, as remarked by Senator Hoar, are unlawful at common law. The crudity and the utter impracticability of the antitrust act of July 2, 1890, is now generally conceded. In his recent special message to Congress, dated March 25, 1908, President Roosevelt said:

This antitrust act was a most unwisely drawn statute. \* \* \* It is mischievous and unwholesome to keep upon the statute book, unmodified, a law like the antitrust law, which, while in practice only partially effective against vicious combinations, has nevertheless in theory been construed so as sweepingly to prohibit every combination for the transaction of modern business. \* \* \* The Congress can not afford to leave it on the statute book in its present shape.

So far we are all agreed. But just here we come to the parting of the ways. This bill H. R. 19745, which you are now considering, is based upon the idea that the antitrust act of July 2, 1890, with all its crudities and misadventures shall stand; that upon it shall be constructed a system of administrative supervision and control of commerce, industry, agriculture, and labor, and of railroad property which is foreign to our American ideas of government and expressive only of bureaucratic rule, a most hated form of tyranny, which the English-speaking people of the globe long since abolished when they established the principles of liberty regulated by law. This I have endeavored to explain in a recent pamphlet entitled "Judicial and Administrative Supervision and Control of Railway Affairs—an Historical Argument." I will hand you a copy of that document.

This bill H. R. 19745 now before you proposes an illogical and, to my mind, absurd scheme of regulation, and ingrafted upon a legislative misadventure, which, if adopted, would continue under flagrant conditions the legislative and judicial troubles through which this country has passed during the last eighteen years, or since the enactment of the unfortunate antitrust act of July 2, 1890. It proposes to leave on the statute books the first six sections of that act which repealed a wholesome provision of the common law dictated by the common sense of mankind. This Senator Hoar deprecated; and in regard to it Senator Knox, while filling the office of Attorney-General of the United States, said:

It is difficult to improve upon the great unwritten code known as the common law. Under its salutary guaranties and restraints the English-speaking people have attained their wealth and power. It condemns monopoly and contracts in restraint of trade as well.

But this bill H. R. 19745 goes further in the false move toward the abrogation of the protection afforded to human society in the common law. It proposes, contrary to the principles of the Constitution of the United States, to confer upon an officer of the administrative government, the Commissioner of Corporations, and upon a bureau of the administrative government, the Interstate Commerce Commission, judicial powers, thus fulfilling the words of Mr. Justice Brewer, who said a few months ago, "Legislation may be turning everything over

to commissions, but the courts have not yet been heard from." He added, in the same connection, "When the matter of legislation by commission gets to the courts they will be found upholding the Constitution with the same fidelity in which it has been held since the days of John Marshall."

To particularize, this bill proposes to confer upon the Commissioner of Corporations the function of issuing registers which are essentially licenses to commercial and industrial corporations and associations, to farmers' associations, and to labor organizations for the purpose of enabling them to enter into combinations. The idea of issuing licenses to conduct any sort of legitimate business in a land devoted to liberty by the Constitution of 1787 appears to me to be a shocking travesty upon American institutions. It is unmistakable bureaucracy.

Furthermore, this mischievous bill in explicit terms confers upon the Commissioner of Corporations, subject to the concurrence of the Secretary of Commerce and Labor and to regulations prescribed by the President of the United States, purely judicial functions, which the Constitution of the United States confers upon the "judicial power of the United States." In a word, it proposes to institute a system of administrative supervision and control over the commercial, industrial, and labor interests of this country contrary to the principles of liberty which have, from the beginning, characterized our governmental institutions. It proposes, in short, to institute a system of administrative oversight in the nature of bureaucracy, a form of government expelled by the English-speaking people of the globe centuries ago, and which can never be revived in this country consecrated by the fathers to the supreme object of securing "the blessing of liberty to ourselves and our posterity."

I am informed that the American Federation of Labor has already signified its objections to this bill for reasons deemed sufficient by its chief administrative officer. The wage-workers of this country have a warm place in the hearts of the American people. By orderly conduct and judicious organization they have greatly advanced their interests. The act of June 29, 1886, recognized trades unions, and by the act of June 1, 1898, strikes were recognized as legal and provision was made for the mediation and arbitration of disputes. I fully subscribe to the principle of collective bargaining, which is the basis of trade unionism. The American Federation is presided over by Mr. Samuel Gompers, a man of great administrative ability and undoubted integrity.

I understand also that a commercial organization of New York City has protested against the provisions of the bill. I am confident it will be repudiated by the farmers and by the great commercial and manufacturing organizations of New York City and of the entire country, when they come to understand its true import. From the beginning liberty has been secured and property and the uses of property have been amply protected under due process of law and the equal protection of the laws as administered by the judicial power of the United States. There has not been any demand for the interposition of any bureaucratic exercise of power, such as that provided for in this bill. I believe, sir, that it will be utterly repudiated by the American people when they get time from the excite-

ment of a national political campaign to fairly appreciate the real import of it. H. R. 19745 is simply legislative hodge-podge.

I see it stated that a distinguished member of the Civic Federation has proposed that the Interstate Commerce Commission shall be endowed with judicial powers and practically supersede the Supreme Court of the United States in matters relating to commerce. Sir, these gentlemen seem to ignore the fact that this is a triune Government; that it consists of a legislative power, an executive power, and a judicial power, equal in power and in glory. Sir, the judicial power of the United States will be a regnant power in this country long after the Interstate Commerce Commission and the Bureau of Corporations and all the advocates of bureaucracy have been consigned to oblivion.

For the reasons thus stated, I believe that the reputed purpose of H. R. 19745, that of a bid for the votes of laboring men, of farmers, and of business men generally, will utterly fail of its object. The wage-workers will repel it, and the farmers and business men of the country will scornfully reject it as a blight upon their liberties.

Mr. Chairman, I believe that the act of July 2, 1890, commonly known as the antitrust act, should be amended, and I propose to you such amendment, which consists in the insertion of the words "unjust or unreasonable" after the word "every" in sections 1, 2, and 3 of the act. This will give to the act the meaning which Senator Hoar assumed it would have in the absence of those words, but which the Supreme Court of the United States decided that it needed in order to accomplish the intent of Congress.

Section 11 of the proposed bill (H. R. 19745) contains a provision conferring upon the Interstate Commerce Commission such autocratic powers and delegated judicial functions for the regulation of the railroads which I have already mentioned as exhibiting a purpose to establish bureaucratic government in the United States. Upon this subject I have already expressed my views quite fully in a pamphlet entitled "Judicial and Administrative Supervision and Control of Railway Affairs." I have the honor to submit a copy of that report as a part of this hearing.

In this connection, I desire to submit to you briefly my views upon the question of railroad regulation. I have been an earnest advocate of full and adequate railroad regulation from the very beginning, or since the year 1866. For twenty-one years after the passage of the act of June 15, 1866, styled "the charter of the American railroad system," the railroad companies of this country were earnestly engaged in solving the railroad problem. I was, as an officer of the National Government, one of the earliest advocates of regulation by law, and have ever since been an earnest adherent of the principle of regulation announced in the act to regulate commerce, approved February 4, 1887, of which the Hon. Shelby M. Cullom, Senator of the United States from the State of Illinois, was the author. The absolute success of that system of regulation, including amendments prior to March, 1906, has been proven by the results of experience.

On January 16, 1905, Senator Elkins, chairman of the Senate Committee on Interstate Commerce, introduced in the United States Senate a resolution of inquiry, addressed to the Interstate Commerce Commission, for information in regard to what had been accomplished during the then preceding eighteen years of the work of the

Commission. The answer of the Commission, dated May 1, 1905, embraced the following data:

	Number in 18 years.
Total number of complaints heard by the Commission.....	9,099
Total number of complaints disposed of through the mediatorial offices of the Commission.....	9,054
Number of informal complaints.....	8,319
Number of formal complaints.....	770
Number of cases appealed to the courts.....	45
Number of cases sustained by the courts.....	8
Number of cases of unjust discrimination sustained by the courts.....	8
Number of cases of exorbitant rates sustained by the courts.....	None.

From private sources of information it appears that the total number of freight transactions on the railroads of the United States during the eighteen years covered by the above data amounted to approximately 3,000,000,000.

The figures furnished by the Interstate Commerce Commission show that of the total number of complaints which reached the Commission, amounting to 9,099, the total number disposed of through the mediatorial offices of the Commission amounted to 9,054, or more than 99 per cent of the total of cases. Of the 45 cases appealed to the courts by the Commission only 8, or less than one-fifth, were sustained by the courts, and in 37 cases the Commission was defeated. Of the total number of complaints made to the Commission, 8,319, or 91 per cent, were of so simple or unimportant a nature that they were disposed of informally by a mere exposure of the facts in the several cases. This work was performed mainly by subordinates in the employ of the Commission.

From the above data it appears that the complaints entertained by the Commission amounted to about 1 case in 330,000 freight transactions. It also appears from the same report of the Commission that while the few cases sustained by the courts involved unjust discriminations, not a single case involved an exorbitant rate. The Chairman of the Interstate Commerce Commission has declared that exorbitant rates in this country is practically an obsolete question.

This marvelous record of compliance with the requirements of law constitutes an anomaly in the history of statutory provisions regulative of human conduct. Besides, it utterly refutes the idea that the common law, existing statutory laws, and the ordinary judicial tribunals are inadequate to the complete and effective administration of justice in the regulation of the railroads of the United States.

One of the most beneficent features of the original act to regulate commerce consists in the fact that it has removed from the courts a great number of controversies which come under the designation *de minimis non curat lex*. This is clearly indicated in the above table, which shows that of the 9,099 complaints heard by the Commission 9,054 were disposed of by the Commission and that only 45 cases were appealed to the courts, of which only 8 cases were sustained by the courts, all of which cases involved unjust discrimination, and not one involved an exorbitant rate. I believe that the Supreme Court of the United States fully appreciates this valuable assistance rendered by the Commission, and at the same time that it fully intends to hold the Interstate Commerce Commission firmly in its place. It is an elementary fact that no administrative body is competent to perform



judicial functions which at the same time is charged with the duties of detective, witness, defendant, party complainant, and judge in the same proceeding.

Besides this record of the successful regulation of the railroads, there has been a constant and remarkable reduction in rates. This is shown for all the railroads of the United States as follows:

	<i>Average receipts per ton per mile.</i>	<i>Cents.</i>
1882.....		1.24
1892.....		.94
1902.....		.76
1903.....		.78
1904.....		.79
1905.....		.78
1906.....		.77

From this date it is seen that the average charge for the year 1906 was only 62 per cent of the average charge during the year 1882. There has been a constant fall in rates on the railroads of the United States during the last twenty-six years. This is not clearly shown in the foregoing data, for the reason that during the last six years the wages of labor and the prices of material used in the maintenance of railroads has constantly increased, while the charges for transportation services have been constantly reduced.

Mr. Chairman, in my belief the most dangerous political heresy of the present day consists in the attempt to substitute autocratic administrative supervision and control of both corporate and individual property and uses of property for that judicial determination of the rights of property which has escorted our civilization for centuries. I observe also an unmistakable tendency to establish bureaucratic methods of government in this land of liberty, and I see in this bill, which you have before you, House bill 19745, a most glaring attempt in that direction. Therefore, I earnestly hope that this committee will consign it to the sleep which knows no waking.

The results of hostile legislation, both State and national, upon the commercial, transportation, and financial interest of the United States began to be felt during the last two months of the year 1906 and the first three months of the year 1907, in the depreciated value of railroad securities. Such depreciation amounted to about \$5,000, or more than the cost of the civil war. It became evident to thoughtful men that this enormous destruction of capital foreboded national financial disaster. The crash came in the month of October, 1907, at a time when, as was generally supposed, the country was at the summit of prosperity. The results of that crisis are still felt throughout the country in all its financial interest.

About a month later the effects of the monetary crisis began to tell upon the commercial and industrial interests of the country. The decadence of the traffic-producing industries soon began to be felt by the railroads. The car shortage which had existed during the preceding two or three years was suddenly changed to a car surplusage, or idle cars. On December 24, following the monetary crisis of October, 1907, there were 209,310 idle freight cars on railroads of the United States. On April 1, 1908, there were 306,507 idle freight cars in the United States, or nearly 100,000 more than in the preceding December. Besides, 345,000 railroad employees have been thrown out of employment on railroads of the United States since the financial crisis of October, 1907, in consequence of the decrease of business.

An effort has been made to ascertain the total number of laboring men in the country who have been thrown out of employment since the crisis of October, 1907. A representative of the laboring interest has stated that the total number as reported by "some organizers and representatives is 3,160,000." This is now the subject of verification, but the true number is undoubtedly very large.

The reasonableness of charges and the reasonableness of restraints of various sorts is an ancient judicial problem with which the Greeks and Romans struggled more than two thousand years ago. In this eminently practical age, the reasonableness of prices and the reasonableness of charges for services rendered has been clearly determined by competitive condition well known to every intelligent citizen. The bare fact recorded by the Interstate Commerce Commission that of three thousand million freight transactions in the entire country not a single case of unreasonable or exorbitant rates, per se, has been proved in the courts fully justified the Chairman of that Commission in declaring before the Senate Committee on Interstate and Foreign Commerce that exorbitant rates in this country is practically an obsolete question. This result has been attained not in pursuance of any general enactment or specific legal inhibition in restraint of excessive charges, but as the result of the competition of commercial forces. This fact is well known as a limitation of freight charges by every practical traffic manager in the land. The only cases of unreasonable rates which the country has been called upon to consider during the last twenty years, have been rates prescribed by State legislation or by State railroad commissioners, which were so unreasonably low as to be confiscatory of railroad property interests.

At this time when hostile legislation has wrought such havoc with the commercial, industrial, and transportation interests of the country, it is pleasant to record the fact that the Federal judiciary especially charged with the sacred duty of protecting "life, liberty, and property" of every citizen through "due process of law," and "the equal protection of the laws" has been true to its constitutional function of caring impartially for the interests of both capital and labor and the maintenance of order and justice throughout all our vast country. In a recent case arising out of a statute of a certain State, the circuit court judge declared that the rate fixed by the legislature, and the provisions of the law relative, thereto were "almost a disgrace to the civilization of the age." On March 23, 1908, the Supreme Court of the United States sustained the opinion by the circuit court judge in the case referred to and on the same day sustained the decision of a circuit court judge in a similar case in another State, the State of North Carolina. In each of the above-mentioned cases the rates fixed by acts of the legislatures were declared to be "in fact confiscatory and therefore unconstitutional."

The question as to the extent to which and the manner in which the supervision and regulation of corporate property shall be subjected to administrative or to judicial control is as yet an unsolved problem, both as regards the exercise of State and national governmental authority. It would be the height of folly to attempt to solve that problem on the eve of an excited national political campaign, for it involves not only controverted and difficult economic questions, but also difficult constitutional and legal questions. Governor Fort, of New Jersey, in his recent inaugural address expressed the diffi-

culties which attend any attempt to frame any such statute. In that connection he said:

Corporations have come in our business world to remain for all time. Corporate methods are the most satisfactory for business purposes in many cases. Every business or enterprise honestly incorporated should be protected, and the public made to feel confidence in its corporate organization. Capital invested in corporations must be as free from wrongful attack as that invested by individuals, and the State should do everything to foster and protect invested corporate capital and encourage the public in giving to it support and confidence.

The amendment suggested by Mr. Nimmo is as follows:

An act to amend an act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That sections one, two, and three of an act to protect trade and commerce against unlawful restraints and monopolies, approved July second, eighteen hundred and ninety, be, and are hereby, amended so as to read as follows:

SEC. 1. Every unjust or unreasonable contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall unjustly or unreasonably monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every unjust or unreasonable combination, in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

#### STATEMENT OF MR. HERBERT KNOX SMITH, COMMISSIONER, BUREAU OF CORPORATIONS.

MR. SMITH. Mr. Chairman, I do not propose to appear for the bill in its entirety. I simply want to suggest certain questions which I think this bill illustrates as well as any I have seen, and to give, as far as I can, reasons for the general policy concerned in your discussion, the general principles of expediency connected with the measure and the legal propositions that appear to be connected either directly or indirectly therewith.

In the first place, from a constructive standpoint, there are certain things desired and desirable, I think, as I understand the industrial situation. The bill includes possibly three essential questions: First, the permission or allowance of a reasonable degree of combination; second, the securing of a much larger degree of publicity as to corporate operations and organizations, and third, the principle which is set forth in section 10 of the bill as introduced, which has the power of disapproval, as stated there, by the Commissioner of Corporations. The first two matters of reasonable combination and publicity are locked together in my mind. I think it is generally admitted that modern conditions require a certain amount of com-

bination and that certain industrial combination is essential. The question is how to draw the line between that which is reasonable and that which is not. It is also everywhere admitted that greater publicity as to corporate affairs is very necessary, and this bill puts the two together, makes the one conditional on the other. The advantage of that plan is that it gives a chance for an optional system. Anyone who chooses to give information about the affairs of his corporation does so and thereby secures the right to enter into reasonable combination.

The great advantage of an optional system like that is this: I have studied, Mr. Chairman, a great many times the bills which have been introduced by you, among others, in regard to publicity, and I have been thoroughly in sympathy with the object. One difficulty with them, however, is that a compulsory system would include necessarily a great number of small concerns in which the public has no interest at all. It would make the system burdensome both to the administrative officers and to the small concerns and serve no good end. The plan of this bill being optional will, I think, bring in only the large concerns in which the public are interested. That is one advantage. The second advantage is that it will avoid a number of constitutional legal questions. Under the optional system it is hard for me to see how you can raise certain legal questions which may be raised against a compulsory system. Of course, the elimination of opposition is very desirable. In the third place, it will bring about something that I feel from my experience is very necessary, and that is an atmosphere of cooperation between the Government officials and the corporate interests. The optional system will be rather on the line of conference than on the line of compulsory, unfriendly system, which is exemplified now by the Sherman law, where the Government and the corporations meet only in collision. Those, in general, are the main principles of the bill. Added to that is the third suggestion which is contained in section 10, which provides that the Commissioner of Corporations shall have certain power of disapproval. That is optional in its main feature. It allows any persons representing a registered corporation who think they are entering into a contract which may be attacked under the Sherman law to bring that contract to the Commissioner of Corporations and submit it to him. If within thirty days he does not approve of it, if he takes no action at all, then this new law applies automatically, and the result simply is that if the Attorney-General or the United States Government through its prosecuting officers attack that contract thereafter they are simply obliged to prove that it is an unreasonable restraint of trade.

Mr. DAVENPORT. May I inquire, Mr. Smith, whether you are addressing yourself to the printed bill or the proposed substitute prepared and submitted by Mr. Low?

Mr. SMITH. My remarks at present are addressed to the printed bill. I am not sufficiently familiar with the proposed substitute.

The CHAIRMAN. Have you seen the substitute?

Mr. SMITH. I have just seen it.

The CHAIRMAN. Then I infer that you have not been consulted with reference to its structure; you are not responsible for its present legislative shape?

Mr. SMITH. I am not; but I understand, however, that the general principles that I will discuss are substantially applicable to the amendments that have been made. I understand the amendments

chiefly refer to section 10. I am speaking now as to the printed bill. I do not think the amendments affect the legal propositions involved.

The effect of section 10 is simply an effect on the prosecuting officers of the Government. If the Commissioner acts at all the situation of the contract submitted to him is necessarily the same as it is to-day under the old Sherman law. That is the only effect his action can have. If he does not act, the new law applies. One argument for such a change is this: Men are continually coming to the Department of Justice, and they come to me and say: "We have a contract here, or an organization, which we want to carry out. Is this legal or is it not legal? We want to obey the law. Can you tell us what the bearing of the Sherman law is on this contract?" I simply have to say: "I can not tell you anything about it. If I did attempt to tell you the Department of Justice might overrule me to-morrow. It has been borne upon me very forcibly. That is the position in which a great many business men are placed. They come and plead for information as to how to obey the law of the country. They come and ask what the law is, and they can not get the information.

The CHAIRMAN. If they employed a good lawyer they would come pretty near finding out.

Mr. SMITH. There is a great deal of difference of opinion still.

The CHAIRMAN. That occurs everywhere upon any proposition from the beginning of time down.

Mr. SMITH. This is a question of difference of degree, not of kind, a very decided difference in degree. This law is exceptionally difficult of interpretation, and anything that tends to make it clearer in view of the tremendous interests which it affects seems to be desirable.

The CHAIRMAN. Does that account for the failure of the Department of Justice to put it in force—because it is difficult to interpret?

Mr. SMITH. I can not speak for the Department of Justice.

The CHAIRMAN. It does not come under your Bureau?

Mr. SMITH. No, sir.

The CHAIRMAN. Do you think that it tends to eliminate the uncertainty when you put in the item of unreasonable?

Mr. SMITH. I will take that up later. I appreciate that point perfectly.

The CHAIRMAN. The main proposition is the standard that is reasonable?

Mr. SMITH. I will take that up later, and I will suggest some way in which that standard may be reached. There are certain other distinctions, the distinction between corporations without capital stock and not for profit—a distinction that is made by the very words themselves—no such information is required from them as from corporations with capital stock and for profit, because they have not it to give, and the public is not greatly interested therein.

The CHAIRMAN. Is there not the same interest if it results in the restraint of interstate trade?

Mr. SMITH. There is certain interest in certain directions.

The CHAIRMAN. Why should not that contract be filed if they enter into an agreement in restraint of interstate trade?

Mr. SMITH. It may be under section 10.

The CHAIRMAN. The Commissioner of Corporations is to determine the effect of the contract and why should not he have the contract of an association without capital stock in order to give them immunity, just as he has the contract of an association with capital stock?

Mr. SMITH. That contract may be filed with him.

The CHAIRMAN. Why should not a voluntary association without capital stock be obliged to file its contract?

Mr. SMITH. It is required to do so.

The CHAIRMAN. They can not get any immunity without that?

Mr. SMITH. No, sir; under section 10 they have the same option. One other point. This law applies a limitation as to section 7 of one year. As I understand it now, there is no limitation in the act itself. The circuit court of appeals in the case of *Atlanta v. Chattanooga Company* (127 Fed. Rep., 23) stated that the State law applied, it being a case of private damages, and happened in that particular case to be ten years.

The CHAIRMAN. As the law in that special jurisdiction?

Mr. SMITH. Yes, sir.

The CHAIRMAN. How about criminal prosecutions?

Mr. SMITH. I am not fully satisfied on that point. My impression is it would be the three years' limitation.

The CHAIRMAN. We have a general statute of limitation of three years, and whether it applies to this particular matter, you would not be able to say?

Mr. SMITH. I do not know. We have discussed that several times, and the general conclusion was that it would probably be the three years' limitation. I can not substantiate that.

I would like to take up some legal points.

The CHAIRMAN. By the way, let me suggest that while it is true that I have had pending measures on this line for some little time, and have had considerable conference with your Bureau, not only while you have held the office but before, perhaps I ought now to say that I have changed my view as to the power to compel the production of information.

Mr. SMITH. I understand.

The CHAIRMAN. My view has been changed by the decision of the tribunal that naturally controls me—the Supreme Court.

Mr. SMITH. The Howard case?

The CHAIRMAN. Yes, sir. Your Bureau, as I understand, now has the power to compel all of the publicity that is provided for by the bills that I have introduced?

Mr. SMITH. We have the power to investigate any specific organization.

The CHAIRMAN. Have you not the power—I do not know whether you so understand it—to compel all the publicity provided for in the bills I have had pending?

Mr. SMITH. I am not sure. Has there been any substantial difference between the several bills you introduced?

The CHAIRMAN. Not much.

Mr. SMITH. As I remember, they provide a specific outline of information to be covered by regular annual reports.

The CHAIRMAN. Yes, sir.

Mr. SMITH. I have always been in some doubt about that. We have the power to investigate specific corporations. Here is the act [handing same to the chairman].

The CHAIRMAN. The act reads:

The said Commissioner shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investi-

gation into the organization, conduct, and management of the business of any corporation, joint-stock company, or corporate combination engaged in commerce among the several States and with foreign nations, excepting common carriers subject to "An act to regulate commerce," approved February 4, 1897, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce; and to report such data to the President from time to time as he shall require.

Is that sufficient to authorize you to require from corporations in general all the information that I set out in the bills I have pending?

Mr. SMITH. The difficulty in my mind lies in the want of system. We can require any corporation engaged in interstate commerce to comply with a specific request for information as to the business carried on under the power conferred by reference to the interstate-commerce act.

The CHAIRMAN. Of course, all our power comes under the interstate-commerce clause.

Mr. SMITH. Under the interstate-commerce act?

The CHAIRMAN. Yes, sir. You are given practically all the power that the Interstate Commerce Commission has?

Mr. SMITH. So far as it is applicable.

The CHAIRMAN. Why does it not cover the whole ground? The Interstate Commerce Commission compels all kinds of information from railroads—that is, some kinds they have. I do not think they do all kinds. I do not think they have exercised the power. If you have the same power they have, why can not you establish a system of compelling publicity under the power you now have?

Mr. SMITH. There are two difficulties. In the first place, our power of compulsion is based upon a subpoena, and if the subpoena is issued it carries with it immunity to the person who gives the information—one very important consideration—a very broad, sweeping immunity.

The CHAIRMAN. Can you get information from anybody without giving them immunity?

Mr. SMITH. They can give it voluntarily.

The CHAIRMAN. Yes, sir.

Mr. SMITH. The second difficulty is that we have never been able to make clear in our minds whether we have the right to require a definite system of reports from corporations engaged in interstate commerce. That is a large proposition.

As to the question of information generally, the Adair and Howard cases are, if I may assume to approve of the Supreme Court, perfectly good law in my opinion. They lay down a proposition, which I think should be laid down, that the power of Congress extends only to matters substantially related to interstate commerce.

The question here is one of relevancy. In the Howard case they held that there might be a man employed by a railroad company who had nothing to do with interstate commerce, and in the Adair case, that the question of membership in a labor union had nothing to do with interstate commerce, that there was no relevancy, that the class of men attempted to be brought under that act had no relevancy whatever to interstate commerce. On the other hand, the question of information—it is impossible to say that any of the information asked for by this bill does not have relevancy to the question of interstate commerce.

The CHAIRMAN. Is your fundamental legal proposition as to the propriety of the information in the last analysis that it must have relevancy?

Mr. SMITH. Yes, sir.

The CHAIRMAN. You proceed on the ground that you can not ask for information either directly or indirectly that is not relevant to interstate commerce?

Mr. SMITH. I do not want to lay that down as my final opinion.

The CHAIRMAN. For the purposes of this discussion, that is your view?

Mr. SMITH. Yes, sir. For instance, we ask for the capitalization of the Pennsylvania Railroad; part of it may have reference to interstate commerce and part of it to intrastate trade; nobody can tell which.

The CHAIRMAN. Where is the point between capitalization and interstate commerce?

Mr. SMITH. Capitalization is supposed to represent the capital invested, and no man can tell to what it is applied without getting this information.

The CHAIRMAN. In what way does the capital invested articulate with interstate commerce? That is to say, in what way does it facilitate or impede—I suppose that would be the basis?

Mr. SMITH. It would facilitate.

The CHAIRMAN. It must have some relation to interstate commerce. It must either facilitate or impede in some way interstate commerce. Does it?

Mr. SMITH. Yes, sir; it does.

The CHAIRMAN. That seems to be a reasonable basis. I do not mean to say that it covers every exigency, but it must in some way, at least theoretically, either facilitate or impede interstate commerce.

Mr. SMITH. I think that definition will answer for the purposes of this discussion.

The CHAIRMAN. In what way does the capital of a railroad company or a business organization facilitate or impede interstate commerce?

Mr. SMITH. It is the only means by which they can carry on business.

The CHAIRMAN. Suppose the capital is \$150,000, how does that fact either facilitate or impede interstate commerce? Take the United States Steel Trust, which has a large capital. The fact of that capital would not of itself have any articulation with interstate commerce—in what way does it facilitate or impede it?

Mr. SMITH. You can not have commerce without capital.

The CHAIRMAN. That is very true. Take the United States Steel Corporation—not for an offensive illustration—which has a capitalization of over a billion dollars. In what way is interstate commerce facilitated or impeded whether the United States Steel Corporation has capitalization of half a billion dollars or a billion dollars?

Mr. SMITH. Because, for instance, they are enabled by means of that capitalization to establish a distributing system covering the entire country which would affect the entire volume of interstate commerce, which is one of the most essential points Congress desires to know about.



The CHAIRMAN. Suppose they have an actual value of half a billion and a fictitious value of half a billion, how does that fact in any way facilitate or impede interstate commerce?

Mr. SMITH. That is another question. That is a step in advance of our present discussion. You now raise the question as to what is the relation between actual capital and the nominal capital.

The CHAIRMAN. What purpose have you to get information about capital if the development of those facts does not affect interstate commerce?

Mr. SMITH. The actual capital does affect commerce.

The CHAIRMAN. In what way does a larger or smaller capital in and of itself either facilitate or impede interstate commerce?

Mr. SMITH. It allows of an increase or decrease in the amount of interstate commerce, which is the thing that Congress is spending a great deal of money to ascertain.

The CHAIRMAN. The fact that the United States Steel Corporation has an actual value of \$500,000,000 and a capitalization of \$1,000,000,000 does not increase the volume of business?

Mr. SMITH. No, sir.

The CHAIRMAN. If it does not increase the volume of business—

Mr. SMITH (interrupting). You have assumed something there which we can not assume. We find out whether they have an actual capital of \$500,000,000.

The CHAIRMAN. Does it come down to a question of solvency?

Mr. SMITH. No, sir; not exactly. We want to find out the actual amount of capital and the amount of capitalization.

The CHAIRMAN. That is the only connection you can show?

Mr. SMITH. That is the most important connection which occurs to me.

The CHAIRMAN. It really comes down to this—if there is not any capitalization there would not be any corporations. Does that in any way affect interstate commerce—facilitate or impede it?

Mr. SMITH. The amount of capital—the extent of the volume of interstate commerce—is something that is very desirable to know and for which we are spending a great deal of money.

The CHAIRMAN. Capitalization has no relation to interstate commerce?

Mr. SMITH. Yes, sir; it shows the amount of capital invested, and that will determine the amount of interstate commerce.

The CHAIRMAN. In what way?

Mr. SMITH. Because there is so much capital to be used in distributing agencies, in railways, and in all sorts of transportation lines, in the buying and selling, back and forth.

The CHAIRMAN. Take the United States Steel Corporation, because we can carry that right along as an illustration. Suppose they manufacture a million tons of rails and you want to find out how much interstate commerce they do, could you prove in court that they were transporting a million tons of rail by proving what their capitalization was?

Mr. SMITH. If they claimed that they were transporting a million tons of rails, and we could prove that they had only a capitalization, say, of \$10,000, this would be relevant to show that they were not transporting any such amount of rails; that it would be impossible to do that amount of business on that capital.

The CHAIRMAN. Does that necessarily follow?

Mr. SMITH. Yes, sir; you can not transport a million tons of rails on a \$10,000 capitalization—that is the point.

The CHAIRMAN. What other fact in the line of publicity in addition to capitalization would have a direct connection with interstate commerce?

Mr. SMITH. The same would apply to bonds and to profits.

The CHAIRMAN. That of course involves the capitalization?

Mr. SMITH. Yes, sir. The profits which are the returns on interstate commerce, gross expenses, gross receipts, in fact, the entire balance sheet involves items that are the direct result and the direct means of interstate commerce. It is pretty hard to state them all.

The CHAIRMAN. Suppose they are doing business at a loss, would that fact be visible?

Mr. SMITH. Yes, sir.

The CHAIRMAN. Would that show that they were not engaged in interstate commerce?

Mr. SMITH. It would show not only the volume of interstate commerce, but the result of it.

The CHAIRMAN. What concern has the public in that?

Mr. SMITH. The United States Government.

The CHAIRMAN. What concern has the United States Government whether or not the corporations are losing money in interstate commerce?

Mr. SMITH. We are spending a great deal of money to ascertain the conditions in international trade.

The CHAIRMAN. That does not answer the question. Whether a corporation is doing business at a profit or a loss, what necessary connection does that fact have with the regulation of interstate commerce?

Mr. SMITH. Take, for instance, a railroad proposition. We are concerned in the question of rates. The Interstate Commerce Commission has the power to a certain extent to fix rates.

The CHAIRMAN. That is a railroad proposition?

Mr. SMITH. Yes, sir.

The CHAIRMAN. And continuing that down to the business corporations, you want to have an opportunity to fix the price of products?

Mr. SMITH. No, sir.

The CHAIRMAN. Where is the parallel between that and the business proposition, if you do not propose to fix the price?

Mr. SMITH. For instance, the question of taxes, taxes either by the General Government in the ordinary form or taxes by tariff. For instance, it is a question of very great importance what profits are being made in a certain line of industry in order to say what restrictions can be applied to it without killing it.

The CHAIRMAN. Then interstate commerce has a legal connection with the side of the tariff?

Mr. SMITH. I think we are getting off from the question.

The CHAIRMAN. Do you think there is any regulation of interstate commerce that would involve the question of fixing the amount of tariff—could not that be worked out?

Mr. SMITH. Interstate commerce might be of considerable importance in fixing the tariff.

The CHAIRMAN. I mean the regulation of interstate commerce. How does the regulation of interstate commerce in any way furnish a legal connection between the question as to how much the tariff schedule should be?

Mr. SMITH. It has in prior ones.

The CHAIRMAN. You can not have any commerce without foreign commerce.

Mr. SMITH. You speak of commerce between the States. I was using the word "interstate" to cover "foreign" commerce in this connection.

The CHAIRMAN. Do you think your Bureau would investigate foreign commerce under this bill—investigate corporations engaged in foreign commerce for the purpose of developing information that would enable the Ways and Means Committee later on to recommend a tariff schedule?

Mr. SMITH. We would not unless authorized to do so.

The CHAIRMAN. Do you think that is within the scope of your Bureau?

Mr. SMITH. We have nothing to do with the purpose for which the information is used. If the Ways and Means Committee or the House of Representatives should ask us to secure information, we would endeavor to compile it, within the terms of our act.

The CHAIRMAN. You have to have some legitimate purpose in order to justify you in getting information in the beginning?

Mr. SMITH. As long as the purpose is connected with interstate commerce we can get it.

The CHAIRMAN. But it is not available for any other purpose; you could not develop it for the purpose of getting information for fixing a tariff schedule?

Mr. SMITH. I would not want to restrict the powers of the Bureau.

The CHAIRMAN. Do you think within the scope of your Bureau you can proceed in connection with any information that does not relate to interstate commerce?

Mr. SMITH. Interstate and foreign commerce.

The CHAIRMAN. That is all the same thing. You do not imagine there is any distinction between the powers you have in connection with foreign commerce and interstate commerce?

Mr. SMITH. No, sir.

The CHAIRMAN. The scope of your activities is confined within the constitutional limitation involved in the authority given under this act?

Mr. SMITH. Yes, sir.

The CHAIRMAN. And if they instruct you to proceed beyond that you would not have any power to proceed?

Mr. SMITH. If they asked me for something that is within my power to get and furnish, it is not for me to question the purpose for which it is to be used.

The CHAIRMAN. I agree with you perfectly.

Mr. SMITH. The courts have laid down the proposition that the right to get information is a very broad one. I have a number of authorities on that line, which I will be glad to file with the committee—the Interstate Commerce Commission against Baird, the Same against Brimson, the Same against the Railway Company, and some other cases. Those are all Interstate Commerce Commission

cases. In the case of the Interstate Commerce Commission against Baird, which was the coal case, certain contracts were asked for by the Commission, and the coal companies refused to produce them on the ground that they had to do only with intrastate commerce. The circuit court held the contracts to be irrelevant. The case went to the Supreme Court, and the Supreme Court, reversing the circuit court, held:

The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the act and to investigate the whole subject of interstate commerce as conducted by such carriers and, in that way, to obtain full and accurate information as to all matters involved in the enforcement of the act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation.

The CHAIRMAN. That confines it altogether to interstate commerce?

Mr. SMITH. The contracts were not necessarily interstate commerce.

The CHAIRMAN. I have not read the case recently, but it was held that those contracts had no connection with interstate commerce?

Mr. SMITH. They were intrastate contracts.

The CHAIRMAN. The contention of the railroad companies was that they were per se State contracts and had not any necessary connection with interstate commerce, but the court held that they did have a direct connection with interstate commerce?

Mr. SMITH. Yes, sir.

The CHAIRMAN. Of course they could not be used for the purpose of prejudicing the interests of the railroad companies so far as the State commerce, perhaps, went, but they were competent so far as related to their interstate transactions?

Mr. SMITH. That is it, substantially; although the bulk of the contracts had nothing to do with interstate commerce, the fact of the interstate features justified the demanding and production of the documents; that as long as there is any information desired of particular classes of stock capitalization that bears on interstate commerce we have a right to that information.

The court said this in the Baird case :

It is to be remembered in this connection that we are not dealing with the ultimate fact of controversy or deciding which of the contending claims will be finally established.

That was in the coal case.

This is a question of relevancy of proof before a body not authorized to make a final judgment, but to investigate and make orders which may or may not be finally embodied in judgments or decrees of the court.

The disinclination of the court to draw any hard and fast lines as to the precise character of the information which may be sought for is disclosed in the following words of the court:

The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof.

The CHAIRMAN. In the recent case where a controversy arose with the Harriman roads, where Mr. Harriman refused to make some statement, is not that very much more vigorously in favor of your point than those authorities?

Mr. SMITH. I was not able to get a copy of that opinion.

The CHAIRMAN. It goes further than any suggestion you have made?

Mr. SMITH. Yes, sir. In the Brimson case, which is also an interstate commerce case, a little earlier, they laid down the general rule which I think covers this case pretty completely and states the basic principle fully. The Supreme Court said:

An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control.

That is, the basis of the whole thing is information.

All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling, by all lawful methods, obedience to such rules.

I would be willing to rest the case on that one quotation. It states there that if the information is desired for legislation that it must be obtained, and that the legislative body is the proper place to get it.

The CHAIRMAN. That of course does not give the full delimitation of the powers?

Mr. SMITH. No, sir.

The CHAIRMAN. That would be to say that there was no information legitimate for Congress to have that did not give Congress information that it was entitled to have in the exercise of its power?

Mr. SMITH. Yes, sir.

The CHAIRMAN. And unless it is to be legitimately so considered in determining how Congress shall exercise its constitutional power?

Mr. SMITH. That is my personal opinion. There is a further proposition which has been made to me, with which I do not now agree—that is, the fact that Congress has complete control over interstate commerce gives them the right to impose any conditions which they choose upon the exercise upon interstate commerce. That is, Congress can say no man shall engage in interstate commerce unless he furnishes Congress with the information asked for. That is the proposition which has been made to me. I do not at present agree with that.

The CHAIRMAN. If that be sound, Congress could practically manage all the business of the country.

Mr. SMITH. It comes pretty close to that. I do not now approve of it.

The CHAIRMAN. The Howard case practically eliminates that additional proposition?

Mr. SMITH. I think it does tend that way, but it did not settle precisely that question.

Mr. DAVENPORT. Do you limit this in your thought to corporations, artificial persons, or does it embrace all natural persons as well as artificial?

Mr. SMITH. I do not limit it.

Mr. DAVENPORT. The power to seek for information?

Mr. SMITH. No, sir.

Mr. DAVENPORT. The same power over natural persons that they have over the artificial persons?

Mr. SMITH. Yes, sir; with the distinction made as to the constitutional rights of natural persons.

Mr. DAVENPORT. That is the constitutional immunity. The scope is not only such that it embraces artificial persons created by States or Congress, but natural persons representing every branch of interstate commerce not confined to transportation?

Mr. SMITH. The power embraces all.

The CHAIRMAN. That is another proposition?

Mr. SMITH. Yes, sir.

The CHAIRMAN. Your proposition is that the power proceeds from one common source?

Mr. SMITH. Yes, sir.

The CHAIRMAN. And that there is no constitutional justification for establishing distinctions in connection with the exercise of that power?

Mr. SMITH. That is it exactly. There is no distinction made. In the case of *Hale v. Henkel*, it was held that the question of quasi-public duties had nothing to do with the case.

The CHAIRMAN. What were the facts in that case?

Mr. SMITH. Briefly, there were a number of contracts between different individuals made for the purpose of restricting prices and output.

The CHAIRMAN. Contracts for the monopolization of trade?

Mr. SMITH. Yes, sir; but they had an interstate feature in them. I merely speak of that case to show that the power is not confined to quasi-public corporations like railroads.

The CHAIRMAN. I suppose the power that we exercise over the railroads is quasi-public entirely independent and comes under the interstate commerce clause pure and simple?

Mr. SMITH. Yes, sir.

The CHAIRMAN. That would not apply to railroad charters?

Mr. SMITH. No, sir.

Apart from the general law, which I think covers this completely, there is the question of practice. The Interstate Commerce Commission has the power of investigation and the requiring of information, and they have had for over eighteen years, and as you will see by reading section 20 of the interstate commerce law it covers everything. It says:

That the Commission is hereby authorized to require annual reports from all common carriers, subject to the provisions of this act, and from the owners of all railroads engaged in interstate commerce as defined in this act; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments.

The CHAIRMAN. Of course, that is all confined, however, to the interstate commerce proposition?

Mr. SMITH. To interstate carriers, yes; but the description of the information itself is unrestricted.

The CHAIRMAN. Of course there is a great variety of facts detailed. Has the power of the Commission to compel a number of those facts ever been settled by the courts?

Mr. SMITH. It has been settled in their favor a number of times, I think.

The CHAIRMAN. We all know that the returns heretofore made to the Interstate Commerce Commission were never made under oath and never amounted to anything.

Mr. SMITH. Of course they have been very valuable for statistical purposes.

The CHAIRMAN. That is true; but as far as binding the officers of the corporations, they amounted to very little.

Mr. DAVENPORT. Do you recognize any intrinsic distinction between the power of Congress to regulate interstate carriers and other people engaged in interstate commerce, admitting the fact that Congress has the power to legislate as to the price to be charged for transportation; or is it your idea that Congress could regulate the price to be charged for goods in interstate commerce? Is there not a distinction, for example, between the power of Congress over the subject of interstate roads and the power of Congress to regulate commerce in other branches?

Mr. SMITH. That is a little aside from my present argument, and it would take a long time for me to answer that question.

The CHAIRMAN. Of course, in one case Congress has the legislative power to fix the rate for which transportation shall be sold and I suppose it is fair to assume that all the legislation must come down to the question of procuring the transportation to be furnished for a reasonable rate without discrimination?

Mr. SMITH. That covers the interstate commerce act.

The CHAIRMAN. All the things that the Interstate Commerce Commission have the power to enforce in the last analysis are expected to produce equal rates at a reasonable price?

Mr. SMITH. Yes, sir.

The CHAIRMAN. And it must all come down in the last analysis to the question of what is a reasonable price for the commodity sold and whether we have the same legislative power to undertake to determine the price of merchandise?

Mr. SMITH. Not altogether, to my mind.

The CHAIRMAN. Where do you get the point of articulation except in the public price? How does it concern me whether the United States Steel Corporation or the Standard Oil Company, if you please, is engaged in the monopolization of trade, unless the product that I buy from them costs me more than it otherwise should? You represent the consumer?

Mr. SMITH. That is true, among other interests.

The CHAIRMAN. Is not the consumer's interest the interest we are looking out for?

Mr. SMITH. Yes, sir; but we have to look out for others.

The CHAIRMAN. To be sure. What interest does the corporation have, except to get a fair return on its capital? What interest does the corporation or the individual have except to get a fair price?

Mr. SMITH. The public is interested in the public health and morals.

The CHAIRMAN. You are now getting into the domain of the police power.

Mr. SMITH. No, sir; the power given by the commerce clause is plenary.

The CHAIRMAN. Is it your proposition that under the commerce clause we can exercise the police power?

Mr. SMITH. That depends on your definition of police power. Take the lottery cases.

The CHAIRMAN. Take the general proposition.

Mr. SMITH. There they exercise such a power.

The CHAIRMAN. Do you say that the court predicated its action upon that proposition?

Mr. SMITH. In the lottery cases they certainly exercised these powers, and we are continually doing it for the question of safety in the Steamboat-Inspection Service.

The CHAIRMAN. What other questions are involved in the ordinary business corporation?

Mr. SMITH. Take, for instance, a ship corporation; we put large restrictions on their boats; we require them to carry life-preservers.

The CHAIRMAN. Take a corporation engaged in merchandise; take the Standard Oil Company, or take the Steel Corporation, which manufacture products. What interest has the public in the regulation of the Steel Corporation as distinguished from the question of price they pay for the goods?

Mr. SMITH. A boiler that is made of steel might explode. That is inspected by the Government now at the mills and stamped. It is a question of public safety.

That covers, I think, the points I desired to make on the question of information.

I will take up now another question, the question of the word "reasonable." Two questions are connected with that. In the first place, whether that is a distinction recognized in common law. I understand there are some criticisms on that point and the brief I will submit covers that pretty completely.

The CHAIRMAN. What ground do you take?

Mr. SMITH. That at common law there is a very marked and well-established distinction between a reasonable and unreasonable restraint of trade. Judge Taft, in the Addyston Pipe case, says:

Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void and were not enforced by the courts.

And Chief Justice Tyndall said:

We do not see how a better test can be applied to the question whether reasonable or not than by considering whether or not the restraint is such a one as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. What-



ever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; and if oppressive, it is in the eye of the law unreasonable.

The CHAIRMAN. That construction is not predicated on conspiracy.

Mr. SMITH. It was predicated on where a man was carrying on a work in certain lines. Now, let me read the decree in the Trans-Missouri case. Mr. Peckham said:

Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature.

That is, at the time of the Trans-Missouri decision in 1897, the opinion of the court recognized the distinction as established for hundreds of years in the common law.

The CHAIRMAN. There is no question about that?

Mr. SMITH. No, sir.

The CHAIRMAN. That opinion does not predicate the term "reasonable or unreasonable" upon the term "combination?"

Mr. SMITH. That was in the Trans-Missouri case. Then we come up to 1890, when the law was passed.

The CHAIRMAN. Is there not a distinction between a combination and a conspiracy in restraint of trade?

Mr. SMITH. A combination is where men get together and combine—two or more men—and fix the price.

The CHAIRMAN. That is a restraint of trade?

Mr. SMITH. Yes, sir.

The CHAIRMAN. How do you define conspiracy?

Mr. SMITH. Where a man prior to the Sherman law either agreed to do an unlawful act or where he agreed by unlawful means to do a lawful act.

The CHAIRMAN. Under the Sherman law that is unlawful?

Mr. SMITH. Yes, sir.

The CHAIRMAN. What is the legal definition of a combination, where two men combine to restrain trade?

Mr. SMITH. The restraint of trade is not unlawful; the combination is unlawful.

The CHAIRMAN. Is not the agreement between two or more persons to restrain trade covered by the Sherman law?

Mr. SMITH. Yes, sir.

The CHAIRMAN. I am referring to the Sherman antitrust law.

Mr. SMITH. I thought you were just using that as an illustration. I was talking about the common law. My proposition went solely to the common-law distinction.

The CHAIRMAN. I want to read from the dissenting opinion of Judge Holmes in the Northern Securities case, where he states the distinction, and see how that appeals to you. He says:

Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own. Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect

upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm.

If he is right, he quite clearly states the legal distinction between a contract per se in restraint of trade and combinations and conspiracies; if he is correct. The question in my mind is whether or not any authorities can be found that show that any court has ever predicated upon combinations and conspiracies tending to monopolize the element of reasonableness or unreasonableness, or whether or not they do not always predicate the qualification of reasonable or unreasonable upon what he calls "contracts in restraint of trade."

MR. SMITH. I see your point. My impression is that it is so, that they have. I am not prepared to answer that point offhand, however.

MR. DAVENPORT. Have you any case?

MR. SMITH. I can not say that I have at hand now.

MR. LITTLEFIELD. If you will have your man look up my speech, made in 1903, you will see that I submit a large number of authorities prepared by the law clerk of the Interstate Commerce Commission, in which those cases are all collected, and up to that time he was not able to find a single case where the element of reasonable or unreasonable was predicated upon combinations or conspiracies, but they were all predicated upon what Justice Holmes here referred to as "contracts between private individuals," or contracts where people contracted themselves out of trade.

MR. SMITH. Where the effect was upon one of the contracting parties and not upon the public.

MR. LITTLEFIELD. Of course, when one individual contracts with another to contract himself out of trade, that, of itself, if it is general as to time and place, is theoretically and technically, perhaps, in a sense, in restraint of trade. Of course that proposition applied with very much greater force one hundred years ago, when there would not be more than half a dozen people engaged in any business. I am not sure, in my own mind, whether we could find any legal justification for predicating reasonable or unreasonable upon conspiracies as tending to monopolize as distinguished from contracts where a man contracted himself out of trade.

MR. SMITH. I can not answer the proposition now specifically, but I will as near as I can later.

MR. LITTLEFIELD. I will be glad to get the benefit of your investigation on that line, and I think it may be an important distinction.

MR. SMITH. Taking up the further point in connection with reasonable and unreasonable, and those words—the point that has been made—that the insertion of the word "reasonable," as you raised a little while ago, may render the statute so indefinite as to make it inapplicable and void as applied to particular cases.

MR. LITTLEFIELD. The very proposition is that it invalidates all its criminal provisions by reason of the fact that it leaves entirely uncertain, without the aid of any definite legal standard, the crime against the individual; but I believe you have some suggestions on that line.

MR. SMITH. Yes; I have some suggestions on that line. In the first place, I could not, of course, admit that the word "unreasonable" is indefinite or uncertain. It has been construed about as often, I suppose, as any word in the law has been construed in connection with this particular subject, and of course the fundamental proposition—

In re Grand Jury (charge, Morrow, D. J.)	62 Fed., 840
United States v. Cassidy et al.	67 Fed., 698
Moore v. United States	85 Fed., 465
United States v. Atchison, Topeka and Santa Fe Railway Company	142 Fed., 176
United States v. Armour & Co. et al.	142 Fed., 808

Mr. LITTLEFIELD. He can put those reports in the record. Your proposition is that the statute, at any rate, whether the civil side or the criminal side has been most relied upon, is both civil and criminal in its character?

Mr. SMITH. Yes; but that its character, practically, has been almost entirely civil.

Mr. LITTLEFIELD. In its practical application that that side has been relied upon almost wholly?

Mr. SMITH. Yes, sir.

Mr. DAVENPORT. May I inquire, Mr. Smith, whether or not the determination of whether it is a penal or remedial statute purely depends upon whether the criminal prosecutions or the civil are resorted to?

Mr. SMITH. Certainly not.

Mr. DAVENPORT. Let me call your attention to three distinct things in that act—the criminal proceedings, the forfeiture and confiscation of all trust-made goods, and the treble damage feature. Are not all those within the construction of State laws by courts penal in their character?

Mr. SMITH. You make a distinction, Mr. Davenport, between penal and criminal?

Mr. DAVENPORT. Certainly I do.

Mr. LITTLEFIELD. The Northern Securities case, of course, as we all know, was a bill in equity on the part of the Government to dissolve the company on the ground of the violation of the Sherman anti-trust law. I will read you a short extract from Mr. Justice Holmes's opinion to see whether you agree with him. I am reading from page 401. Mr. Justice Holmes says:

The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words can not be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted is one of the other sort.

Without suggesting that that is any opinion of the law, it is a pretty effective statement of what he thought about it.

Mr. SMITH. It certainly is what Justice Holmes thought about it.

Mr. LITTLEFIELD. What do you think about that proposition?

Mr. SMITH. When it comes to the statement that it is vain to insist that this is not a criminal proceeding, I can not follow him. Can you?

Mr. LITTLEFIELD. I do not suppose he expects that sentence to be taken literally. I suppose what he intends to lay down was that the state of facts before the court was of the character denominated "criminal," and in receiving their construction in the criminal proceedings the parties were entitled to the same consideration in the civil proceedings. If that be true, of course the language of this statute is subject to the criticism, no matter whether you rely on the

civil side or the criminal side, that would be applied to a criminal statute; that is, if the general proposition is true.

Mr. SMITH. There might be some force in that contention, but I would not admit its truth for a minute.

Mr. EMERY. I would like to inquire if, in view of the fact that the evidence spoken of by Mr. Justice Holmes in that case and in other cases exists as to the criminal character of these combinations, there is at the present time any action pending by the Bureau of Corporations or the Department of Justice to prosecute criminally any of these combinations?

Mr. LITTLEFIELD. He does not know anything about the Department of Justice, and the Bureau of Corporations does not conduct any prosecutions.

Mr. Low. Did Mr. Justice Holmes, in expressing his opinion as to the criminal character of the law, go on to express the idea in any form that the use of words "unreasonable" or "reasonable" was favored?

Mr. LITTLEFIELD. He did not discuss that. Of course, Mr. Justice Holmes dissented from the majority in that case and held that the facts were such that the Northern Securities Company did not come within the provisions of the Sherman antitrust law.

Mr. Low. My recollection is that the whole court discussed that question of reasonable and unreasonable. Did not any of them state that the use of the words destroyed it?

Mr. LITTLEFIELD. I would not state about that without examining it carefully, but I do not think there has been any discussion on that question since the Trans-Missouri case, where the court passed upon that, except, possibly, the dissenting note of Mr. Justice Brewer in one of the cases recently decided, where there is an intimation on his part that under certain circumstances he might reach a different conclusion.

Mr. SMITH. That is the Northern Securities case?

Mr. LITTLEFIELD. Yes. I remember hearing Mr. Justice Brewer raising that point.

Mr. SMITH. In the Trans-Missouri case, in discussing the case, the judges all along have assumed, apparently, that the word might be put into the act without invalidating the same. We had rather a peculiar condition. Up to 1890, when the law was passed, of course a combination in restraint of trade was not criminal, so there was no means of getting a construction of the word "reasonable."

Mr. LITTLEFIELD. You mean not criminal as to Federal purposes?

Mr. SMITH. No.

Mr. DAVENPORT. On that very point the same thing is in the interstate-commerce act, and that was construed by Mr. Justice Brewer, who held that the indictment was void.

Mr. SMITH. In the Tozer case, 52 Federal Reporter?

Mr. DAVENPORT. Yes.

Mr. SMITH. But after the law was passed in 1890 there was a period between 1890 and 1897 where they got construction on this question of reasonable. That period stopped, of course, with 1897, because in 1897 the Supreme Court handed down the Trans-Missouri decision and said it did not make any difference whether the combination was reasonable or unreasonable, the law applied to it, and between 1890 and 1897 we had a number of decisions, among which

was the Trans-Missouri case in the circuit court of appeals, where it was stated that the word was practically in the law, without any suggestion that its presence in the law would invalidate it.

Mr. LITTLEFIELD. They went so far as to hold that the particular contract they were discussing was reasonable, and therefore not within the law?

Mr. SMITH. Exactly.

Mr. LITTLEFIELD. That is quite a different thing from discussing the question as to whether the word "reasonable" in the law would affect its criminal provisions.

Mr. SMITH. It is a different proposition, I admit, Mr. Chairman, but very relevant thereto, and a number of other judges have gone on the same proposition.

Mr. LITTLEFIELD. Of course you will understand that that judge might have so held, and held that the statute did not apply if the word "reasonable" was in, and therefore make the act invalid, and for that reason it was not valid.

Mr. SMITH. He did not say so. No; the entire trend of the opinion up to the Trans-Missouri case in the Supreme Court was to the effect that the word "reasonable" was substantially in the law, and in the Trans-Missouri case in the Supreme Court Mr. Justice Peckham, in the opinion of the majority of the court, uses this language; that is, as to whether the word "reasonable" ought to be in the law or not. He says:

These constructions, however, are not facts. If the act ought to read as contended for by the defendants, Congress is the body to amend it, not this court, intimating that if the word "reasonable" should be in the law Congress should put it there.

Mr. LITTLEFIELD. Bearing upon this distinction that I have just been suggesting, I will call your attention to Mr. Justice Brewer's concurring note in the Northern Securities case, where he is supposed to have departed from the theory that the Sherman antitrust law did not apply to all restraints of trade, reasonable or otherwise. He says:

Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld.

That is exactly the same kind of a contract that Mr. Justice Holmes differentiates. At least, he refers to a course of decisions upon which the court had predicated reasonable and unreasonable at common law. My suggestion is that those contracts are only such where people contracted themselves out of business, and never combinations and conspiracies in restraint of trade. If I am correct about that, that, of course, is what his language refers to. Of course I may not be correct about that.

Mr. SMITH. He may be referring to that, but I do not think he agrees with it; he does not say anything about ancillary contracts.

Mr. LITTLEFIELD. He refers to the kind that the long course of the decisions at common law had predicated as reasonable and ought to be upheld, when you find out what kind those were. If you find out that, in the course of the decisions at common law, the courts have never held a combination or conspiracy that tends to monopolize trade reasonable, of course, those are not the kind of companies you

are to refer to. If, on the other hand, the only kind the courts have referred to are such as between two parties, where one contracted himself out of business, that must be the kind he referred to. That involves, of course, the correctness of the original assumption.

Mr. SMITH. But you will notice in that very place you are reading, just before that, that Justice Brewer said:

That act, as appears from its title, was leveled at only "unlawful restraints and monopolies."

I was referring to another point. He said:

I think that in some respects the reasons given for the judgments can not be sustained. Instead of holding that the antitrust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act.

Mr. LITTLEFIELD. Those contracts being considered in that case were clearly contracts that tended to the monopoly of trade.

Mr. SMITH. He makes that point there. The word "reasonable" ought to have been construed into the act.

Mr. LITTLEFIELD. And then he gives his reason why down below.

Mr. SMITH. I presume that is intended for the reason why.

Mr. LITTLEFIELD. Oh, yes.

Mr. SMITH. There he makes the point that the word "reasonable" should be in the act.

Mr. LITTLEFIELD. No, he does not say it should be in the act.

Mr. SMITH. Substantially so. He says the contracts should have been declared void because unreasonable.

Mr. LITTLEFIELD. No, he says the act does not apply to minor contracts, as he calls them, as to which the common law had predicated the element of reasonableness.

Mr. SMITH. He says the ruling should have been that the contracts there presented were unreasonable restraints of trade, and as such within the scope of the act.

Mr. LITTLEFIELD. Sure; but that is not the same thing as reading the word "reasonable" into the whole act.

Mr. SMITH. No, but it is reading the word "unreasonable" into the act.

Mr. LITTLEFIELD. No, it is not that, because he predicates his term "reasonable" upon these contracts. We have to ascertain what class of contracts he is referring to, but if this line is well defined, the whole opinion is very obvious and clear.

Mr. SMITH. He does, for certain purposes; read the word into the act.

Mr. LITTLEFIELD. You are correct in that; he does not hold that it ought to go in, but he holds it now is in; that is not quite the same thing.

Mr. SMITH. But it is along the general line of the argument I am making.

Mr. LITTLEFIELD. The only point I make is that there is nothing in Judge Brewer's opinion that leads us to infer that he would hold that you can properly predicate upon a conspiracy that tends to monopolize trade under any circumstances, the term unreasonable or reasonable. There is nothing in the opinion that authorizes us to assume that, because in that particular case they were passing upon a combination that clearly had a tendency to monopolize trade.

Mr. SMITH. Yes; they were in that particular case. There have been several cases which cover this point, and particularly one in the District here, the court of appeals of the District of Columbia, in 1896, where a medical practitioner was convicted under an act of Congress approved June 30, 1896, of unprofessional and dishonorable conduct, and the court said:

This obvious duty must be performed by the legislature itself, and can not be delegated to the judiciary. It may doubtless be accomplished by the use of words or terms of settled meaning, or which indicate offenses well known to and defined by the common law. Reasonable certainty in view of the conditions is all that is required, and liberal effect is always given to the legislative intent when possible.

Those are the words "unprofessional and dishonorable conduct."

Mr. DAVENPORT. What was that case?

Mr. SMITH. The case of *Czarra v. Board of Inspectors of the District of Columbia*. (25 App. D. C., 443.)

Mr. STEBBINS. Mr. Chairman, probably if there was anyone who knew what the legislative intent was, it was Senator Hoar, and in 1903, in a speech, he referred to section 1 of the antitrust act, and said that the words "in restraint of trade" were not modified by other words, because, he said, if they were, it would be conferring legislative power upon the courts, and that they purposely left out. That shows the legislative intent, if he stated the matter correctly.

Mr. LITTLEFIELD. That does not militate against this authority Mr. Smith has referred to.

Mr. SMITH. I have some other cases on that line, also the case of the safety-appliance law, which has been construed in a number of cases, and never attacked on any such ground as this.

Mr. LITTLEFIELD. What is the language you have in mind that bears on this point?

Mr. SMITH. "A sufficient number of cars in it, so equipped with power or train brakes, that the engineer of the locomotive drawing such train can control its speed without requiring the brakeman to use the common hand brake for that purpose."

Mr. LITTLEFIELD. Your point is that that is equally as indefinite? "A sufficient number;" those are the words.

Mr. SMITH. That is the point.

Mr. LITTLEFIELD. Have there been any prosecutions under that?

Mr. SMITH. Oh, many of them, sir; I can get them for you.

Mr. LITTLEFIELD. Do you know whether this question was ever raised?

Mr. SMITH. I am quite sure it was never raised; we have looked for cases and have not found them.

Mr. DAVENPORT. One case came to the Supreme Court, where they sustained it.

Mr. LITTLEFIELD. My question was whether this point of indefiniteness had ever been discussed?

Mr. SMITH. It has never been raised, so far as I know. In the case of the United States *v. the Baltimore and Ohio Railroad* the railroad there was indicted for practicing unreasonable discrimination, a case analogous to the Tozer case, and there the indictment was held bad for not showing the particulars of the unreasonable discrimination. That is reported in 153 Federal Reporter, 997.

Mr. LITTLEFIELD. That is, it did not proceed on the invalidity of the statute, but on the insufficiency of the indictment?

Mr. SMITH. Exactly.

Mr. LITTLEFIELD. This, therefore, from your point of view, would simply say it was incumbent upon the prosecuting officer to allege the specific facts that resulted in the unreasonableness and did not affect the validity of the statute itself.

Mr. SMITH. Precisely.

Mr. LITTLEFIELD. Did you get the citation, Mr. Davenport?

Mr. DAVENPORT. Yes. In 52 Federal Reporter there is a case of a similar character to that.

Mr. SMITH. Lest I take too much of your time, I will proceed to one other important point.

Mr. LITTLEFIELD. Before you leave that question I want to get one or two practical suggestions from you. What, in your judgment, would be a reasonable combination or conspiracy that tended to monopolize trade?

Mr. SMITH. Suppose you strike out the word "conspiracy."

Mr. LITTLEFIELD. Do you recognize in the Sherman antitrust law any reasonable distinction between a combination by way of a trust or otherwise? The proposition now is that the corporations may be engaged in the combination or conspiracy in restraint of interstate trade, if it be reasonable. What, in your judgment, is a reasonable combination or conspiracy under the Sherman antitrust law?

Mr. SMITH. I will point out my difficulty there. When you use the word "reasonable" or "conspiracy," it may mean an unlawful end, or by unlawful means. You do not mean by unlawful means?

Mr. LITTLEFIELD. No; an unlawful end.

Mr. SMITH. Exactly.

Mr. LITTLEFIELD. What would be a reasonable combination or conspiracy that tended to monopolize interstate trade?

Mr. SMITH. Cutting out the unlawful means part, as I have suggested, there frankly I should have to take the same attitude as the court, that whatever is a fair protection to the parties in interest and is not against the public interest is reasonable.

Mr. LITTLEFIELD. Does that give me definite information as to what you would hold to be reasonable?

Mr. SMITH. About as definite as can be given offhand.

Mr. LITTLEFIELD. Would the element of the price of the product enter into your determination of that question? I would like to know that right now.

Mr. SMITH. It might have some connection with it in certain circumstances.

Mr. LITTLEFIELD. Are you going to make that incidental, or the principal element in your determination? I will ask you now this concrete question: Suppose the United States Steel Company files with your Bureau a contract under this law to accomplish something. I will assume now that they want to enter into a combination or conspiracy to restrain trade which they claim is reasonable in its character. What I would like to know from you is whether the price that they make is going to be a factor in your determination?

Mr. SMITH. It certainly would be a factor.

Mr. LITTLEFIELD. Is it going to be the determining factor, or only incidental?



Mr. SMITH. It might be determining.

Mr. LITTLEFIELD. I think it ought to be the determining one.

Mr. SMITH. I do not think it necessarily would be the determining one.

Mr. LITTLEFIELD. So that you can not say that the price that the consumer is going to pay for steel rails is going to be the determining factor?

Mr. SMITH. No.

Mr. LITTLEFIELD. Can you think of any other object the United States Steel trust would have in connection with the manufacturing of steel rails except to control the price? What object can they have? If they have any other, I would like to know what it is, if it is not to control the price.

Mr. SMITH. I have not discussed it with them; I can imagine it might have to do with the distribution.

Mr. LITTLEFIELD. What has the distribution to do with it unless it comes to the end of the price?

Mr. SMITH. It might be the traffic over the railroad.

Mr. LITTLEFIELD. What has that to do with the rails unless it comes back to the price?

Mr. SMITH. It affects the welfare of the railroad.

Mr. LITTLEFIELD. How are they going to get the interest on the capital invested unless they get the price from the consumer?

Mr. SMITH. It might be that, and might be for the purpose of protecting their ore deposits.

Mr. LITTLEFIELD. What do they protect those for; to reduce production?

Mr. SMITH. It might be that.

Mr. LITTLEFIELD. And what is that for; to reduce the price?

Mr. SMITH. I should consider the price.

Mr. LITTLEFIELD. Is it not the determining factor?

Mr. SMITH. Not always.

Mr. LITTLEFIELD. What is the object of the Sherman antitrust law unless it is to protect the public against the prices imposed by monopolies?

Mr. SMITH. I know what the Supreme Court said:

Congress did not—

Mr. LITTLEFIELD. That is too obvious for discussion, because there is nothing in the act. But do you mean to say that the Sherman anti-trust act does not proceed, in its ultimate genesis, to protect the public against prices when it condemns conspiracies in restraint of trade?

Mr. SMITH. I do not know that that is its main purpose.

Mr. LITTLEFIELD. What is the purpose of a monopoly to restrain trade; to increase the price or to diminish it?

Mr. SMITH. Usually to increase the price.

Mr. LITTLEFIELD. Usually?

Mr. SMITH. Yes.

Mr. LITTLEFIELD. Can you think of a monopoly that tends to control trade whose purpose is not to increase the price?

Mr. SMITH. Yes; I can think of a great many whose purpose is simply to keep the prices stable. I know of a great many monopolies that put the prices down.

Mr. LITTLEFIELD. Put them down temporarily.

Mr. SMITH. To keep them stable.

Mr. LITTLEFIELD. Why keep them stable?

Mr. SMITH. Because it is better for the business.

Mr. LITTLEFIELD. Better for the public?

Mr. SMITH. Better for the public and better for the business.

Mr. LITTLEFIELD. And must not the consumer stand by and take his chances?

Mr. SMITH. I investigate the question of price.

Mr. LITTLEFIELD. I am asking you whether, when you determine the question as to whether the contract filed before you is reasonable or unreasonable, the effect upon the consumer is not to be the determining factor.

Mr. SMITH. It is a very important factor.

Mr. LITTLEFIELD. Is it not to be the determining factor?

Mr. SMITH. No, sir.

Mr. LITTLEFIELD. Then we are not interested in the protection of the consumer as the great purpose; who are we interested in?

Mr. SMITH. A great many classes.

Mr. LITTLEFIELD. Who are we legislating for under this—for the consumer or the corporation?

Mr. SMITH. Supposed to be legislating for the public.

Mr. LITTLEFIELD. Who is the public, the consumer?

Mr. SMITH. It represents the consumer, employees, employers, natural resources, the transportation lines, and all sorts of interests.

Mr. LITTLEFIELD. Whose interest are we looking out for?

Mr. SMITH. The public interests.

Mr. LITTLEFIELD. Who is the public, the consumer?

Mr. SMITH. It is part of the public.

Mr. LITTLEFIELD. Is it not the great part of the public?

Mr. SMITH. I should say, in regard to one contract, it might be all, in regard to another it might not.

Mr. LITTLEFIELD. Would you pass on any contract and determine whether it was reasonable or not without taking into account the cost of producing to the producer?

Mr. SMITH. Any contract that involved the question of price I should certainly consider the matter.

Mr. LITTLEFIELD. It would be pretty hard to conceive of a contract that tended to monopolize that did not tend to put up the price. The combinations and conspiracies that tend to restrain trade are the ones referred to in the law.

Mr. SMITH. There is a difference between restraining trade and monopolizing trade.

Mr. LITTLEFIELD. If they are not conspiracies that tend to monopolize trade, they do not come within the provisions of the law.

Mr. SMITH. Restraint of trade is not monopoly, necessarily. Those are two distinct things.

Mr. LITTLEFIELD. The act itself provides for monopolies.

Mr. SMITH. The second section is monopoly, the first is restraint.

Mr. LITTLEFIELD. Do I understand that you are going to allow the price to the consumer to be a constant factor in your determination, or are you going to eliminate it?

Mr. SMITH. It would certainly be a very important factor.

Mr. LITTLEFIELD. Would it be a constant factor of the equation?

Mr. SMITH. What do you mean by constant?

Mr. LITTLEFIELD. I mean what I say. Would it be a constant factor of the equation? Would you not have it in mind?

Mr. SMITH. I certainly have it in mind.

Mr. LITTLEFIELD. Would a contract that gave to a number of individuals the control of the market, so that they reduce the output, have any other effect except upon the price to the consumer?

Mr. SMITH. Now, Mr. Chairman, I think you will recognize that this puts me in rather a difficult position as Commissioner of Corporations to answer a question of that sort.

Mr. LITTLEFIELD. Very true, but the responsibility is upon me to recommend this legislation, and ought I not to know what privileges the combinations want to get, and how they are going to do it, and on what basis it is going to be done, before I turned it over to somebody? What I want to get right now is whether the price to the consumer is going to be a constant factor in the general equation. Here is the proposition. Here are great combinations that say they want something. I do not know what they want. They have not told me. Nobody has come with authority from them to tell me. Ought I not to know in the first place what they want and why they want it, and how they expect to accomplish it, and if that is to be submitted to somebody for determination, ought I not to know in advance what that somebody is going to do before I turn it over? Is that not a fair proposition?

Mr. SMITH. No, sir; not quite, I think. You might say: "I propose to establish a court, but I want to know beforehand how it is going to decide."

Mr. LITTLEFIELD. I want to know the factors they are going to take into account when I turn this whole matter over to the Commissioner of Corporations. I think that the purposes of the Sherman antitrust law are to prevent the charging of extortionate prices by combinations that tend to monopolize trade. Is it not fair, in the exercise of a fairly wise discretion, for me to know whether the man who is to finally pay is to be considered as a factor in the equation?

Mr. SMITH. I would answer that yes, right off.

Mr. LITTLEFIELD. Must you not, in the last analysis, depend upon what the reasonable price of everything is going to be?

Mr. SMITH. No, sir; I do not think you have to.

Mr. LITTLEFIELD. Suppose there is a combination of a certain character submitted to you and it involves the production of steel rails? Mr. Carnegie says that is the particular subject that ought to be taken care of, 99 per cent of the other would be criminal combinations, but for some reason or other he seems to have information about steel rails that is not vouchsafed to Congress, that 99 per cent of all the others would be criminal in their character, and should be shut down; how are you going to be able to tell whether the combination for the purpose of controlling the price of steel rails or the conservation of the ore supply is going to be reasonable in its character unless you know something about what those steel rails are going to be sold for?

Mr. SMITH. It certainly would have to be taken into account.

Mr. LITTLEFIELD. You would have to take into account the cost of production?

Mr. SMITH. Yes, within certain limits.

Mr. LITTLEFIELD. Of course you would not get a mathematical demonstration. Then you would have to determine, with reference to what is a reasonable return, about what would be a reasonable price to pay, in a general way.

Mr. SMITH. I would put it rather this way, that probably any fair adjudication of that question would include a consideration of what was an unreasonable price.

Mr. LITTLEFIELD. That is the same thing.

Mr. SMITH. Not by any means.

Mr. LITTLEFIELD. Oh, sure. Below an unreasonable price you can have any price but the price that does not produce any profit. I understand that, but it does not change the scientific attitude of the subject at all. You would have to examine the price to the customer.

Mr. SMITH. That is, I would have to determine whether it was an unreasonable price; I would have to take that into account.

Mr. LITTLEFIELD. And you would have to ascertain, first, what it cost to produce the rails, and next you would have to ascertain, perhaps in ascertaining that question, the amount of capital involved. I would like to ask you this question: Assuming, now, that you have presented to you by some great corporation the concrete proposition, and that within the members of that corporation among others we have one that cost \$150,000 to construct, which is capitalized in our great corporation at \$1,000,000 or \$1,500,000, ten times its original cost and its present cost of duplication. In reaching a conclusion as to what would be a fair cost, would you predicate your judgment on the capitalization of the \$1,500,000 or \$150,000?

Mr. SMITH. Mr. Chairman, I really can not answer that kind of a question, not because it is not a perfectly fair one.

Mr. LITTLEFIELD. Do you mean that the assumption is not based on a fact?

Mr. SMITH. Not at all; but I mean that it requires me to lay down principles now in advance that I neither can lay down nor ought to lay down.

Mr. LITTLEFIELD. Do you suppose I will turn over to you the question, for instance, as to whether the United States Steel Company is entitled to make a profit on a billion and a half when it is capitalized with a million and not know what you are going to do with it?

Mr. SMITH. All you turn over to me is to determine the nature of the contract.

Mr. LITTLEFIELD. You are to determine, in the first instance, whether it is unreasonable or not. You are not prepared to say to me, then, whether, when you determine what is a fair return on the capital of the corporation, you take into account its capitalization or its capital?

Mr. SMITH. I am not prepared to lay down any of the detailed principles upon which these questions ought to be determined.

Mr. LITTLEFIELD. That settles that, then. Let me put you another question.

Mr. SMITH. Except this one proposition, that whoever is in the office should follow the principles so far as they are laid down by the common law and the courts.

Mr. LITTLEFIELD. Laid down by the common law; but you are not prepared to tell me whether the common law would justify you in basing the rate on the capital or the capitalization?

Mr. SMITH. No.

Mr. LITTLEFIELD. Suppose a corporation comes before you that is made up of various others, some of which it has purchased for the express purpose of eliminating them as competing factors. I suppose that is subject to the same answer—that as to these two or three great fundamental propositions which are absolutely at the base of the whole business, you are not prepared in advance to state to me any effect they would have?

Mr. SMITH. I do not think it would be proper or wise for me to do so.

Mr. LITTLEFIELD. It may not be satisfactory to the law making power unless they could know that in advance. In other words, you do not know much more about what would be reasonableness than Mr. Low did when he started in.

Mr. SMITH. I do not know how much he knew.

Mr. LITTLEFIELD. He said he did not know and he did not think anybody else knew.

Mr. SMITH. What I want to point out is the fact of the effect of the commissioner's decision upon the contracts.

Mr. LITTLEFIELD. How long do you think it would take you to examine the United States Steel Company, for you to find out those facts which you do not want me to give the reasons for? How long do you think it would take you to examine the United States Steel Company, composed of about 150 different corporations and involving all kinds of factors, to find out whether a scheme they submit was reasonable or unreasonable?

Mr. SMITH. It depends on what that scheme was and how far-reaching it was. If it included everything, then it would take an indefinite time, of course. It might be a simple agreement that you could look into in ten minutes.

Mr. LITTLEFIELD. Can you conceive of any scheme on the part of the United States Steel Company to control the price of rails that does not involve every other branch of that corporation?

Mr. SMITH. There might be a contract that would be so simple that it would not take long.

Mr. LITTLEFIELD. Suppose a company was going to turn over to the United States Steel Corporation the absolute control of the output and the price—that is what they want, apparently—how long do you think it would take you to examine that company and all the other companies that wanted to engage in that operation?

Mr. SMITH. I could not tell you.

Mr. LITTLEFIELD. It might be six months or it might be a year?

Mr. SMITH. I should have in mind this, at once: That the only effect of my decision was to show whether the prosecuting officer's action was reasonable or unreasonable.

Mr. LITTLEFIELD. That would make it reasonable?

Mr. SMITH. If I did not approve the contract it would make it just as it was under the Sherman law.

Mr. LITTLEFIELD. No; it would make it reasonable if you did not declare it unreasonable. Are you going to declare these contracts unreasonable without investigation?

Mr. SMITH. Oh, no.

Mr. LITTLEFIELD. A sort of a rubber-stamp proposition?

Mr. SMITH. Hardly.

Mr. LITTLEFIELD. I suppose not. How much of this do you think would be workable, as a matter of practice, with the immense number of corporations in this country? How many cases do you think you could pass on in your Bureau?

Mr. SMITH. I have had a good many presented to me that I should say were reasonable.

Mr. LITTLEFIELD. Then the chances are that they did not have anything to do with the Sherman antitrust law. Take this case we had. Of course if we passed this law it is going to be open to contracts and combinations that control the price.

Mr. SMITH. Yes.

Mr. LITTLEFIELD. Do you not think that 99 per cent of them would be of a character to control the price? What are people engaged in business for?

Mr. SMITH. No; I do not think they will.

Mr. LITTLEFIELD. Are people engaged in business for the purpose of making a return on their money?

Mr. SMITH. Of course.

Mr. LITTLEFIELD. How do they make their money except in the price they receive for the goods they sell?

Mr. SMITH. I retract that answer; I think I ought to take that back.

Mr. LITTLEFIELD. There does not happen to be any other way of making money except in the price of goods they sell to the consumer?

Mr. SMITH. No.

Mr. LITTLEFIELD. That is what I thought.

Mr. SMITH. Unless they have investments of various sorts—that is, a mere equivalent.

Mr. LITTLEFIELD. You know what I mean by the question.

Mr. SMITH. My point is this: That contracts come up continually that do not have much, if anything, to do with price.

Mr. LITTLEFIELD. That in terms do not specifically provide for price, but can you conceive of the underlying, central purpose of a great corporation that does not result in the end in the price to the consumer?

Mr. SMITH. Yes; I have seen a great many.

Mr. LITTLEFIELD. That do not have that ultimate purpose in view?

Mr. SMITH. Certainly.

Mr. LITTLEFIELD. I would like to have you give me a case of a combination between a couple of companies that had not anything to do with the price of the product or its output. I am willing to concede I am not familiar with all these things.

Mr. SMITH. I do not pretend to be myself. Take, for instance—I must be a little careful, because I have to refer more or less to things in my own Bureau, which are confidential matters.

Mr. LITTLEFIELD. I do not want you to state anything, of course, that embarrasses the Bureau.

Mr. SMITH. The whole discussion, whatever I say, has reference, necessarily, to knowledge I have of a confidential nature. For instance, a case like this has occurred—I will not say the particular case—where men owning great tracts of timber, for instance, in the present falling off of prices desire to restrict their output.

Mr. LITTLEFIELD. What for?

Mr. SMITH. So as to save their timber. The proposition is this: When there is no large demand for timber, the only way to keep the sales up is to cut recklessly—that is, cut an entire acre, say, and take out only the best timber.

Mr. LITTLEFIELD. That is, when there is not a sufficient demand?

Mr. SMITH. Yes.

Mr. LITTLEFIELD. And, of course, when there is not a sufficient demand, down goes the price.

Mr. SMITH. Yes.

Mr. LITTLEFIELD. And it is not profitable to operate?

Mr. SMITH. Precisely.

Mr. LITTLEFIELD. That is what it comes to.

Mr. SMITH. But they are not attempting to establish the price.

Mr. LITTLEFIELD. Not on its face; but do the lumbermen try to tell me that a scheme which reduces the output is not intended to affect the low price by reducing the amount in the market?

Mr. SMITH. That may be the result of it.

Mr. LITTLEFIELD. Do you think any of them would stand up before me and make that statement? They may say they want to conserve the forests, but, necessarily, keeping the product out of the market has the effect of increasing the price. You know I have lived in a lumbering country.

Mr. SMITH. I am not saying what their intention is.

Mr. LITTLEFIELD. Would you take any stock in it if they stated it?

Mr. SMITH. Possibly I have stated it clumsily.

Mr. LITTLEFIELD. Take this concrete illustration: Do they claim that the operation of the Sherman antitrust law has been so embarrassing to them that they are now in a condition where they have to combine to reduce the output?

Mr. SMITH. I suppose that is what they claim.

Mr. LITTLEFIELD. Are you familiar with the fact that during the years 1905, 1906, and 1907 they were getting the highest prices they ever received for lumber and making the handsomest returns they ever made?

Mr. SMITH. I know they were getting high prices.

Mr. LITTLEFIELD. They were getting enormously high prices. were they not?

Mr. SMITH. Yes, sir.

Mr. LITTLEFIELD. Did they not get them notwithstanding the Sherman antitrust law?

Mr. SMITH. If they got them, the Sherman antitrust law was there.

Mr. LITTLEFIELD. What law has operated to reduce the prices they were getting, and what law is it they are trying to reduce the operation of?

Mr. SMITH. I am citing this, not in this particular concrete case to show what their intention is, but I am citing this as a thing that might happen.

Mr. LITTLEFIELD. You are citing this as a contract that did not show on its face that they did not want to increase the price. If you solve every conceivable doubt that the gentlemen make in their favor, it might put them in a position where they could regulate the law of supply and demand and artificially reduce their output.

Mr. SMITH. Possibly we are at cross purposes here.

Mr. LITTLEFIELD. Is it not open to that?

Mr. SMITH. It is open to that, but I say it is open also to the possible construction that such a contract might be made in good faith.

Mr. LITTLEFIELD. Is it possible for the lumber dealers in this country to enter into a combination by virtue of which they will fail to get the usual supply, and therefore reduce the amount of product in the market?

Mr. SMITH. I do not know; I could not tell you.

Mr. Low. Is it not possible that even if it did affect the price it would be for the public interest because of the importance of preserving the forests? In other words, has this generation the right to deprive following generations of these advantages?

Mr. LITTLEFIELD. I do not think that the conservation of the forests is a consideration to be taken into account in that manner; I do not think people ought to be able to enter into a combination to restrain trade for the alleged purpose of conserving the supply that they use, because, between you and me, I do not take any stock in that kind of a proposition. I do not think that is their purpose. I will concur with you on the proposition that there is some indirect benefit coming from it.

Mr. Low. It may be one of profit, but I think there is public interest in such a situation.

Mr. LITTLEFIELD. True; you and I would agree on that proposition.

Mr. MARTIN. With the permission of the Commissioner, I would like to ask him one question. I understood him to say, in answer to an inquiry of the chairman, that there were various kinds of combinations that would be liable to appeal for registration under this proposed amendment to the antitrust act; that while they might have a combination, it would be a combination not to fix prices or to raise prices, and, therefore, might be a proper, a beneficial, or a permissible combination. For instance, there have been two meetings of the Steel trust, and of all the other steel men that they could get together, representing in the neighborhood of 95 per cent of all the steel producers in the United States. Since the 1st of January two such meetings have been called in New York, and at those meetings the main purpose was not to raise the price, but, to use the language the Commissioner did, to steady the price. Does that not mean that they are steadying business simply to maintain the present high limit, which, in some cases, is 33 per cent above what it was a few years ago, brought up to that point by the trusts?

Mr. LITTLEFIELD. I do not suppose Mr. Smith can tell what those people mean.

Mr. MARTIN. The point I want to make is that that combination would be one of the companies steadying the price, and I understood him to say that these steadying combinations were good things. Then the other point that enters is this, that the Commissioner has stated that much of the matter that he has, which he might use in answering the questions of the chair, is of a confidential nature. Now, the confidential matters in that Bureau of Corporations are not to be permitted to be given to Congress, but are to be given to the President, are controlled by the clause in the act that was inserted



in the Senate after the bill went over from the House, and when it was stated that many of the large trusts and combinations in the country were opposed to the acts on account of the publicity of it, and that that amendment was put in at their request, much objection was raised as to it, and the effect of it then is to give the opportunity for a confidential conference between the great combinations of capital and the one Commissioner—not any reflection upon the present Commissioner—one effect of it is to arrange for a confidential conference between them to see whether they will be registered or not, instead of having their regulation determined in open court.

Mr. EMERY. Could I ask the gentleman just one question, quite apart from the practical standpoint which Mr. Smith feels not at liberty to state. Is the legal standpoint which would determine the reasonableness or the unreasonableness a substantial statement of Judge Sanborn in the Northern Securities case?

Mr. SMITH. I would not want to say offhand.

Mr. EMERY. Substantially?

Mr. SMITH. I have not sufficiently got that case in mind. I was alluding to the Trans-Missouri case.

Mr. EMERY. You said the Northern Securities.

Mr. SMITH. It was the Trans-Missouri case.

Mr. EMERY. Is that substantially what he said?

Mr. SMITH. I do not use it in that connection. I very much prefer not to be obliged to lay down, publicly, anyway, things that would be of the nature of a judicial determination; I am not prepared, not fitted to.

Mr. LITTLEFIELD. You appreciate the significance of the inquiry?

Mr. SMITH. I appreciate it fully. I should be very glad to answer it frankly, if I could.

Mr. LITTLEFIELD. I think you have answered it with perfect frankness.

Mr. DAVENPORT. I have been wrestling myself with the question as to the effect of the insertion of the word "unreasonable" in this act, and I am very much indebted to you for the light you have given me; and, as I understand it, your idea is that the word "unreasonable" in this act would be about what it was at common law?

Mr. SMITH. Yes.

Mr. DAVENPORT. Do you think the gentlemen who drew this act had any such definition as that in mind?

Mr. SMITH. I think they did.

Mr. DAVENPORT. Let me call your attention to this very section 10, where the railroad companies, interstate carriers, are to be allowed to make combinations, "Unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations." Now, from the investigation I have made, every agreement between carriers, that is, public-service corporations, not to compete in prices, is against public policy per se at common law, and were void. So the doctrine is laid down in the Trans-Missouri Traffic Association case, and a large number of cases cited. Now, in this proposed bill there shall be no prosecution unless the same be in unreasonable restraint of trade or commerce. Is it your idea that under this bill every such arrangement between interstate carriers who agree on the prices to be charged for transportation is forbidden?

Mr. SMITH. No; that was not my understanding.

Mr. DAVENPORT. Then there must be in it some other idea than that of the common law.

Mr. SMITH. There is, indeed.

Mr. DAVENPORT. Then, do you think that the importation of the word "unreasonable" here brings with it only the definition that has been applied at common law?

Mr. SMITH. I think the broad definition that has been applied at common law.

Mr. DAVENPORT. Take this particular instance, now. Every arrangement between public-utility corporations to make prices not to compete against each other as to prices is unlawful, void per se. So Mr. Justice Peckham says in that case and in a number of other cases. If there is some other purpose, then, and this act is to be construed in the light of some other standard than that of common law, what is that standard, in your mind?

Mr. SMITH. I think that I have covered that. Mr. Chairman, just one final point on the question of the so-called class legislation, which might be brought up. I am in a constructive position; I am not saying the bill is all right in every detail; I am not arguing for the words.

Mr. LITTLEFIELD. Did you have any hand in the preparation of the original bill?

Mr. SMITH. Yes; I was in conference on it a great deal, so I know what it is meant to do. In this matter of class legislation—

Mr. LITTLEFIELD. Did you go over those features of it that did not relate to your bureau?

Mr. SMITH. Yes; I went over the whole thing. I did not have so much to do with the railroad clause.

Mr. LITTLEFIELD. Before we reach that, I wanted to ask, did you intend, in the language found in section 3, which authorizes a strike for any cause, to authorize a combination for peaceably obtaining results by employees and employers, to authorize a boycott?

Mr. SMITH. We did not intend to authorize any boycott which was prohibited at common law.

Mr. LITTLEFIELD. Prohibited at common law?

Mr. SMITH. Yes.

Mr. LITTLEFIELD. Let us come right back to that. It was held in the recent Loewe case that the action of the labor unions amounted to a boycott. Do you approve of the construction of the court in that case?

Mr. SMITH. Certainly.

Mr. LITTLEFIELD. Do you want to authorize a boycott of that kind?

Mr. SMITH. Certainly not.

Mr. LITTLEFIELD. That is a peaceable boycott.

Mr. SMITH. It is not the peaceable side of it; any boycott that contains the elements of a secondary boycott; it is an intimidation.

Mr. LITTLEFIELD. Your language is that they could do anything they could do peaceably, and in the Danbury Hat case it was peaceable.

Mr. SMITH. That is not my language.

Mr. LITTLEFIELD. Did you approve of that language; did you put it in? I would like to know who put language in here that very deliberately authorizes an interstate boycott just the same as the Dan-

bury Hat case and the Buck's Stove case, and nobody seems to know it.

Mr. Low. May I say the explanation of that clause has been sought for in various ways, but it is just as simple as possible. I think I ought to say how that clause got in there. It must be assumed, I judge, from reading Mr. Davenport's testimony the other day, that it has some very occult purpose to affect the status in the District of Columbia, and has been put in in the interest of the Federation of Labor. The fact is that the clause was drawn and printed before Mr. Gompers ever saw it. It was inserted primarily at my suggestion, because it seemed to me that there is in the ranks of organized labor at the present time, a widespread fear that their right to strike and combine—to make trade agreements—has been called in question by the Supreme Court. I do not say that it has, but I say the fear has been created, and I think it is wise to allay it. That clause was drawn by Mr. Stetson and Mr. Morawetz, and they do not believe it authorizes an interstate boycott.

Mr. LITTLEFIELD. You say Mr. Morawetz and Mr. Stetson claim that when they are authorized to combine for peaceably doing things that that would not bring them within the scope of a decision predicated absolutely upon peaceable conduct?

Mr. Low. They do not think that it authorizes any such a boycott.

Mr. LITTLEFIELD. In any event, if it does, they use language they do not understand the force of.

Mr. Low. They do not understand that, but they are perfectly willing to have it modified.

Mr. EMERY. Do I understand they drew that section?

Mr. Low. They certainly did, and the statement that is incorporated in their printed remarks at the beginning was gone over very carefully with them, so the precise significance of that is embodied in my statement.

Mr. LITTLEFIELD. I know Mr. Morawetz and Mr. Stetson. It would afford me great pleasure for them to take this thing and differentiate it, as lawyers, from the Buck's Stove case and the Loewe case. I may be wrong about it.

Mr. Low. That is the origin of it.

Mr. LITTLEFIELD. They are very bright men, and able men; and they are capable of establishing a legal differentiation if it exists.

Mr. EMERY. Mr. Smith made a remark which I did not understand. He stated he would not authorize any language that could be construed into legalizing what was a boycott at common law. Do I understand the gentleman to hold that any form of boycott was lawful at common law; or does he mean any form of combination?

Mr. SMITH. This is a subject I do not pretend to be familiar with.

Mr. LITTLEFIELD. I do not understand you take any responsibility.

Mr. SMITH. I do not. My impression is that certain forms of boycott, as Judge Gray said in the coal strike commission:

This may be un-Christian, but nevertheless it is legal.

Mr. LITTLEFIELD. That is merely the agreement between a number of men to cease to buy.

Mr. SMITH. Or cease to do anything of that sort. When you go a step further, and those men intimidate other men, then you have the secondary form of boycott, which he said is illegal.

Mr. LITTLEFIELD. In any event, you do not have any desire or function, so far as you have had anything to do with this legislation, of changing the legal status so far, for instance, as the rule laid down in the Buck's Stove and Range Company case is concerned, or the Danbury Hat case?

Mr. SMITH. I do not approve of any such boycott as in the Danbury Hat case; I do not remember the Buck's Stove case.

Mr. LITTLEFIELD. You do not approve of any provision that exempts employees from the provisions of this statute, and then makes it applicable to other people under the same state of facts? Do you believe that this act should be so amended as to make it lawful for employees to do what it is criminal for other people to do?

Mr. SMITH. No; we do not stand for anything of that sort at all, just that question of class distinction. That is a very simple proposition, and I hardly need to point it out to you.

Mr. LITTLEFIELD. Your proposition, first, is that the bill is not subject to criticism, and if it is, you have something to say on the constitutional proposition?

Mr. SMITH. Yes. In the first place, the phrase "class legislation" is a misnomer. They use it as being something objectionable. Class legislation is not objectionable unless the classification is wrong. That is as the court has said in a number of cases.

Mr. LITTLEFIELD. Class legislation, when predicated in a proper manner, is not only lawful, but perfectly feasible and justifiable.

Mr. SMITH (reading). "The power of classification has been upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished."

That covers practically the whole thing. If you have a satisfactory line of classification, then the privileges and duties you assign to that particular class, if they correspond to the classification, are perfectly legal and sufficient.

Mr. LITTLEFIELD. That is, the subject-matter must have inherent elements of classification?

Mr. SMITH. And those elements of differentiation must be related to different privileges.

Mr. LITTLEFIELD. And be substantial?

Mr. SMITH. Exactly. As in this case, you allow a reasonable combination of powers, and then you supervise the use of those powers and ask for publicity, so that any combination that gives you publicity is allowed to combine. The condition and the classification are relevant and inseparable. Of course, as to the effect of the fourteenth amendment and the fifth amendment, I am not prepared to answer on that; nobody has, but I would be willing to lay down as a general moral proposition that the principle of the fourteenth amendment should apply.

Mr. LITTLEFIELD. That is, you would not stand, as a legislative proposition, for anything that deprived a citizen of the equal protection of law, even if we had the power to make it?

Mr. SMITH. No; I would not. It seems quite probable that the Supreme Court would say that, as a part of our fundamental law, that should be sustained, regardless of any constitutional amendment or provision.

Mr. DAVENPORT. As a matter of interest, I understood from some attorneys that the question in the safety-appliance law as to the

powers conferred upon the Interstate Commerce Commission to make rules and regulations in regard to the matter has now been submitted to the Supreme Court.

Mr. SMITH. Yes; I understand so.

Mr. LITTLEFIELD. What case is that, or what question?

Mr. SMITH. The Interstate Commerce Commission are authorized, under the safety-appliance law, to make certain rules, and the question whether or not that does not delegate legislative power is now in the hands of the Supreme Court.

Mr. LITTLEFIELD. That raises the precise question.

Mr. DAVENPORT. The gentleman who told me that is Rush Taggart.

Mr. EMERY. I wanted to ask Mr. Smith if he was familiar with the recently proposed amendment, and if he approved or disapproved?

Mr. SMITH. I will say this much, that I have been told, in general, of one amendment, which was that the entire administration of this bill was to be placed with the Interstate Commerce Commission, publicity and judicial decision and everything else, and to that I objected strenuously, for the fundamental proposition that I did not think the composition of the Interstate Commerce Commission—I do not mean the personnel, but the constitution of it—was such as to give satisfactory publicity on the publicity side; it needed administrative work for that, so I objected vigorously to any change in the bill that put the publicity side into the Commerce Commission. Added to that is the fact that they are loaded to the guards now with work.

Mr. EMERY. Do I further understand that Mr. Smith was favorable or unfavorable to the amendment made to the Hepburn bill by the Warner bill, now before the Senate, substituting the words "for any purpose not unlawful at common law," after "strike for any cause?"

Mr. SMITH. I am not in favor of anything that would allow boycotts such as in the Loewe case.

Mr. LITTLEFIELD. It is going to be a pretty nice question, is it not? Of course, as we stand to-day by the Sherman antitrust law we know where we are. While it may be that there is more or less unrest, it is going to be a pretty nice question to split the legal hairs for the purpose of increasing any rights and privileges under that statute without impairing its total efficiency. It is a pretty difficult proposition. This "unlawful at common law" I have not had time to examine with care, but I may say that I do not quite understand just exactly what the connection of that is going to be with the regulation of commerce. If we are going to import into the Sherman antitrust law common-law offenses, we might get into the position where the court would commence to inquire whether the language meant exactly what it said, and the common law did not apply at all, and therefore we would wipe it all out.

Mr. SMITH. I am simply clear on this one proposition, that I do not favor any such boycott as set forth in the Loewe case, and on the other hand, it is rather difficult to state this exactly right, but there seems to be an apprehension that the doctrine of the Loewe case might be so interpreted as to condemn the very existence per se of labor unions.

Mr. LITTLEFIELD. There is not a thing in the case that justifies that conclusion.

Mr. SMITH. I would not want to say offhand.

Mr. LITTLEFIELD. You have no such recollection of it as would lead you to express that opinion?

Mr. SMITH. There was some language there that was not so far from that, as I recollect.

Mr. LITTLEFIELD. I wish you would call my attention it.

Mr. Low. Is it not true that men have been indicted in New Orleans recently simply for striking?

Mr. LITTLEFIELD. I do not think so. Men have been indicted in New Orleans recently on the ground that they had entered into a combination and conspiracy to restrain foreign trade, and as a part of the restraint of foreign trade they were proposing to strike, which is, of course, an entirely different proposition. I do not understand Mr. Low would want any amendment of this law that would authorize them to combine to restrain or interfere with foreign or interstate trade.

Mr. SMITH. What I had in mind was the organization itself.

Mr. LITTLEFIELD. There may be some language in the opinion that may be subject to that criticism.

Mr. SMITH. I thought so by looking it over.

Mr. LITTLEFIELD. What kind of power do you think is vested in the Commissioner of Corporations, or proposed to be by this act, executive, legislative, or judicial?

Mr. SMITH. I should call it executive. It seems to me an exercise of executive power through the prosecuting officer.

Mr. LITTLEFIELD. If that be so, is it not true that it is not competent for any other tribunal to assume the exercise of the executive power?

Mr. SMITH. They have done that in the interstate-commerce law and in my own law by saying that any person who shall give information shall not be prosecuted.

Mr. LITTLEFIELD. I meant in the exercise of your executive discretion in passing upon these questions you reach a certain conclusion. Assuming, now, that you have acted within legal limitations, of course, we understand that if in exercising this power you stop outside, your act is void. What I want to know is whether, in your opinion, that is not conclusive? Is it competent under our system to vest in the judicial tribunal the power to supervise or revise or overthrow the exercise of executive discretion?

Mr. SMITH. Could an appeal be given from my decision?

Mr. LITTLEFIELD. Could it, indirectly?

Mr. SMITH. I think it could.

Mr. LITTLEFIELD. Is a duty exercised by the Commissioner of itself purely executive?

Mr. SMITH. It is judicial to a certain extent. You mean whether it could be exercised over an executive act?

Mr. LITTLEFIELD. Certainly. This power vested in you is executive in its character.

Mr. SMITH. Yes; that is my view.

Mr. LITTLEFIELD. It is a general principle, is it not, that there is no review of the exercise of executive discretion?

Mr. SMITH. There is no review per se, but I would not want to say that Congress can not establish such a review.

Mr. LITTLEFIELD. That is the precise question. If that is the case, of course the President is the executive head of the Government, and in the vast number of instances which we could justly suggest exercises clearly an executive discretion. If it be true that we can supervise the exercise of that discretion in one branch of the executive, I suppose we can in all.

Mr. SMITH. There would be a marked difference between the Commissioner of Corporations and the President.

Mr. LITTLEFIELD. Would there, in the quality of the power?

Mr. SMITH. I fancy there would; he is the head of the executive department.

Mr. LITTLEFIELD. In what way does the power differ?

Mr. SMITH. The Commissioner of Corporations is largely an arm of Congress to get information.

Mr. LITTLEFIELD. Is he not an executive arm?

Mr. SMITH. He is an executive arm.

Mr. LITTLEFIELD. Can either department invade the other?

Mr. SMITH. They do invade the others at all times.

Mr. LITTLEFIELD. Do you mean by that that the executive can regulate or control the exercise of the judicial power?

Mr. SMITH. No; but the executive can use judicial power, as it does.

Mr. LITTLEFIELD. That may be, but is it not a well-settled legal principle that executive discretion is beyond the control of any other power?

Mr. SMITH. How are you going to tell whether it is executive discretion or whether it is power used by an executive officer which is not executive, but something else?

Mr. LITTLEFIELD. I am taking your hypothesis that it is executive power vested in you, and I assume that when you exercise an executive power you exercise an executive discretion. Of course, I am not suggesting that you might not exercise judicial power, but on the assumption that it is executive, that covers the whole ground. In exercising the executive power you must exercise executive discretion. Can we, either by legislation, or can we by the judicial branch, control the exercise of your executive discretion, or is not the exercise of that discretion final?

Mr. SMITH. I do not think of any cases applicable directly to executive power. I do not think I can answer the proposition intelligently at all.

Mr. LITTLEFIELD. The decisions of the Commissioner of Corporations would be final here unless there is some method of settling it provided that is competent.

Mr. SMITH. As a matter of general principle I do not concur off-hand.

Mr. Low. I think Professor Jenks has looked into that very carefully. Before Mr. Smith goes may I just pursue that inquiry just one step further in regard to the suggested amendment? He said he objected very much to turning the whole thing over to the Interstate Commerce Commission. I do not understand he holds the same attitude toward the proposal I submitted, that there should be a rehearing by the Interstate Commerce Commission that certainly, if it is carried no further than that, provides a review of an adminis-

trative character and takes away the opportunity for any action when the power is exerted by only one; whether the thing should go further is a separate question.

Mr. LITTLEFIELD. Undoubtedly. What you have undertaken to do is, so far as it is competent, to provide a safeguard against the use of the power. That is your proposition?

Mr. Low. Yes. I do not think it affects the legal proposition. I do not understand Mr. Smith to object to the proposition last put.

Mr. SMITH. That is substantially so. The thing I am interested in is the publicity feature. Anything that would relieve me personally of any exercise of executive functions as to what is reasonable would be a great pleasure to me personally; it is not a part of my business. On the other hand, the publicity side is a part of the Bureau of Corporations that I am particular about.

Mr. LITTLEFIELD. How many corporations are there in the country; have you any idea?

Mr. SMITH. I have not any idea. For instance, I have a book that is full of obsolete corporations. You can take the list of any secretary of state and they will show a tremendous mass of corporations. Take West Virginia, now; I imagine a third of the corporations on the books down there were never organized, never had a dollar put in them.

Mr. LITTLEFIELD. Can you estimate the number engaged in interstate commerce?

Mr. SMITH. No, sir; your guess would be better than mine.

Mr. LITTLEFIELD. It runs up in the thousands, I suppose?

Mr. SMITH. Engaged in interstate commerce, there must be 50,000, maybe 200,000.

Mr. LITTLEFIELD. You have not any data?

Mr. SMITH. No; I have been asked that question a great many times, but I could not answer it.

**MEMORANDUM ON H. R. 19745, A BILL TO REGULATE COMMERCE AMONG THE SEVERAL STATES OR WITH FOREIGN NATIONS AND TO AMEND THE ACT APPROVED JULY 2, 1890.**

**THE COMMON LAW ON RESTRAINT OF TRADE.**

A brief consideration of the status of the common law prior to the passage of the Sherman Act is necessary.

*First.* Combinations in restraint of trade were not criminal. *Conspiracies* in restraint of trade were, indeed, criminal by common law, but this was because of the elements of conspiracy and not because of the element of restraint of trade. A conspiracy in restraint of trade, in order to be criminal under common law, must have the same criminal elements as any other conspiracy, namely, a combination of two or more to do an unlawful thing or to accomplish a purpose not in itself unlawful by unlawful means.

*Second.* No damages could be obtained at common law for the injurious effects of a contract in restraint of trade (except in so far as such contract might have also been a criminal conspiracy, as above differentiated from a simple contract in restraint of trade). That is to say, a contract in restraint of trade, even though avoidable and unenforceable, had none of the elements of a tort.



The two foregoing points are covered by Taft, J., in the Addyston Pipe case (85 Fed. R., 279), wherein he said: "Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void and were not enforced by the courts." Citing Mogul Steamship Company v. McGregor, Appeal Cases (1892), p. 25, and others.

*Third.* A contract in restraint of trade at common law was simply not enforceable if unreasonable, and this on the ground of public policy.

The earlier decisions usually dealt with specific cases of contracts in restraint of a man's own right to work, but the later cases, decided under the modern conditions of business, develop the principle much more broadly, and within the last twenty-five years have placed the determination of the question on the matter of the reasonableness and public effect of the contract.

Starting from the early condition, where the question was simply one of the right of a man to contract to refrain from doing certain business over a certain area, up to the recent and modern decisions which involve the question of combination between large interests which may restrain the operations of large amounts of capital and many men, the common law has adhered to the general principle throughout of the reasonableness of the contract as determined by public policy—that is to say, what is "reasonable under the circumstances"—thus allowing the courts to take into consideration the circumstances in the most insignificant case or the circumstances which may involve the interests of entire communities and large amounts of capital.

#### ALTERATION OF COMMON LAW BY THE SHERMAN ACT.

The Sherman law did three things: (1) It enlarged the scope of the common-law provisions so as to include contracts and combinations in restraint of trade without regard to the reasonableness thereof, and made these combinations and contracts civilly illegal, unenforceable, and enjoined; (2) it made such contracts and combinations criminal; and (3) it gave to private parties the right of treble damages for injury caused by such combination. These last two features were a reversal of the common law, for restraint of trade was not a crime at common law, nor was there any right of damages. The rest of the Sherman law is matter of enforcement.

#### DEVELOPMENT OF THE SHERMAN LAW.

Court decisions have settled several important points in this act since its passage.

(1) It covers *all* contracts and combinations in restraint of interstate trade, whether they be reasonable or unreasonable, the courts expressly recognizing at the same time that this distinction was a part of the common law, and that the Sherman law abolished it.

The language of the act includes *every* contract, combination \* \* \* in restraint of trade or commerce among the several States. \* \* \* We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by the act. (U. S. v. Trans-Missouri Freight Association, 166 U. S., 312.)

When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. (*U. S. v. Joint Traffic Freight Association*, 166 U. S., 328.)

That the act is not limited to restraint of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce. (*Northern Securities Co. v. U. S.*, 193 U. S., 331.)

Hardly anything can be less subject to question than the fact that the *Trans-Missouri* decision of the Supreme Court in 1897 and those following it recognized this change, and recognized it also as changing the well-established distinction of the common law between reasonable and unreasonable restraint of trade.

(2) The law was held to include railroads.

The conclusion which we have drawn from the examination above made into the question before us is that the antitrust act applies to railroads. (*U. S. v. Trans-Missouri Freight Traffic Association*, 166 U. S., 341.)

The act was also applied to railroads in *U. S. v. Joint Traffic Association* (171 U. S., 505) and in *U. S. v. Northern Securities Company* (193 U. S., 197).

(3) The law was held to include labor unions for certain purposes. (*U. S. v. Workingmen's Council of N. A.*, 54 F. R. 994 (1893); affirmed (57 F. R. 85); *Waterhouse v. Comer* (55 F. R., 149, 157); *In re Debs* (158 U. S., 564, 599), and others; *Loewe v. Lawlor* (the Danbury Hatters case).)

(4) The *Knight* case (*U. S. v. E. C. Knight Co.*, 156 U. S., 1), frequently misunderstood, is simply referred to here by way of explanation. This case merely determined that production and manufacture, per se, do not constitute interstate commerce, affirming the well-known doctrine on the subject already announced in *Kidd v. Pearson* (128 U. S., 1) and *Coe v. Errol* (116 U. S., 517), and under which a combination of a number of sugar refineries in a certain State for the production of sugar was held not to be a combination in restraint of interstate trade.

#### CHANGE OF POLICY.

From the foregoing it will therefore be observed that a distinct change of public policy took place with the enactment of the Sherman law. Prior to that law it was left to the courts to determine what amount or nature of such restraint rendered the contract contrary to public policy, in other words, unreasonable and therefore unenforceable. The common-law validity of the contract was based wholly on public policy. The Sherman law took this determination out of the hands of the court, and stated conclusively that the public policy was to be, namely, that all restraint of interstate trade was against public policy. Having thus made illegal all contracts and combinations in restraint of such trade, it then added to the degree of such illegality and to the liabilities arising therefrom, by making such contracts and combinations illegal, enjoined, criminal, and allowing a private cause of action for treble damages.

It is with this question of public policy so established by the Sherman law that the bill under consideration primarily deals.

NEED FOR FURTHER CHANGE IN PUBLIC POLICY.

The Sherman law was an attempt to regulate interstate trade by a sweeping declaration of public policy, with drastic measures for enforcing the policy so declared. Eighteen years of experience with this law and the policy which it established have demonstrated the need for further action on this great subject-matter. Much good has been accomplished by the Sherman law, especially in bringing the entire question of combinations to public attention, and thus in helping the growth of a strong and intelligent public opinion thereon.

But there is now need for an advance in policy. As a measure of regulation of interstate commerce for the public good, the Sherman law has been found to be defective, in many cases harmful, and too wide in its prohibitions.

Furthermore, as a measure of regulation, this law is of necessity defective, because, unlike most Federal laws dealing with the great and intricate subject of commerce, it is applied solely by the action of the court and not through any administrative office or body. Suppose the Steamboat Service, regulating vessels, was left to occasional court actions instead of the broad and effective system of administrative regulation which we now have throughout the country. Suppose a similar situation with the administration of the interstate commerce law or the Immigration Service. The inexpediency of such a course in those cases is obvious, by experience; yet such is the policy of the Sherman law, which deals with interests as vital and of far greater extent. It is largely for this reason that the Sherman law has failed to accomplish that regulation of great combinations and corporations which was undoubtedly the motive for its passage. Its application is necessarily only occasional, uncertain, and easily evaded, and it is not too much to say that, far from preventing combination, the Sherman law has forced an extreme degree of combination under legal forms especially adapted to the evasion of that law.

It has become clear that while the prohibition of certain forms of combination is still necessary, there is far greater necessity for effective administrative regulation of combinations.

The decided trend of public opinion in the last few years makes it certain that the country must advance to the position of allowing a certain degree of industrial combination, recognizing that such combination is a modern necessity of trade. But the country properly will not tolerate the idea of allowing such combination in interstate commerce unless such action is bound up with a feasible system of regulating this interstate commerce in the interests of the public. The two must go together.

The law should correct that portion of the Sherman Act which prohibits all combinations of the character above described, whether they be reasonable or unreasonable; but this should be done only as a part of a general scheme to provide for this effective and thoroughgoing supervision by the National Government of all the operations of the big interstate business concerns.

President's message, January 31, 1908.

The bill under consideration is drawn to accomplish these essential purposes.

## ANALYSIS OF THE BILL.

Three objects of primary importance appear in this bill:

First, the securing of a very complete degree of information as to the operations of great interstate corporations.

Second, the allowing of industrial combination so far as the same is not contrary to public policy and public interest, or, in other words, is reasonable.

Third, the providing for a certain degree of administrative action as to such combination.

Based on these three propositions, the bill provides a working system which is wholly voluntary in its method. No corporation is in any way compelled to avail itself of this bill. There are great advantages in such a voluntary system. There are innumerable small corporations which, although engaging technically in interstate commerce, yet are of no public interest whatsoever. These would necessarily be brought under the working of any *compulsory* system of information. The result, as to them, would not only be burdensome, but also useless for any public purpose. Furthermore, a compulsory system would at once raise a number of difficult constitutional questions and require years of litigation to determine the rights connected therewith. All these practical difficulties are avoided by the voluntary system of this bill, and a tendency to cooperation, rather than toward opposition, is thereby fostered.

There is no penalty for refusing to give information. Corporations so refusing simply do not come under the act, and remain exactly in the same position as they are to-day. These smaller concerns simply will not register under the law, because their operations are not of sufficient importance to invite attack under the Sherman law.

Any industrial corporation engaged in interstate commerce by voluntarily furnishing certain information may obtain registration under this bill through the Commissioner of Corporations. Such registration is merely a ministerial act on the part of the Commissioner, who, upon the conditions being fulfilled, *must* register the company, and has no discretion therein. He has, however, discretion for the cancellation of registration upon the three grounds named in the bill, but from this action there is an appeal to the supreme court of the District of Columbia.

The details of information to be furnished as a condition of registration are to be prescribed by regulations established by the President, it being felt that the information could be gotten best in this way, by a flexible system of regulations, rather than by stating the details in the law itself of the information desired. The scope of such regulations is, however, limited to the four subjects named in the bill.

## AMNESTY FOR PAST ACTS.

In view of the indefiniteness and the sweeping character of the Sherman law it is best, in establishing the new system proposed under this bill, to apply to past combinations and acts substantially the same principles as are to be applied to the future combinations, because it is recognized that the business of the country has already

in large part gone through a period of combination. For this reason the bill provides that registered corporations shall not be prosecuted under the Sherman law for existing and past combinations which are reasonable, and furthermore the bill provides a short period of limitation for all prosecutions under the Sherman law against all combinations, to wit, one year after the passage of this act. So many combinations have already been entered into that it would be unfair to leave these past combinations at the mercy of the original unmodified act, while applying the test of reasonableness to future combinations only.

POWER OF THE COMMISSIONER UNDER SECTION 10.

Having thus established the status of the past, the bill provides for the future in section 10, a section which has been subject to considerable misapprehension and which merits serious consideration.

In substance, this section provides that any person or registered corporation about to enter into a contract may submit the same to the Commissioner of Corporations. If the Commissioner does not, with the concurrence of the Secretary of Commerce and Labor, disapprove it within thirty days thereafter, no suit can be brought by the United States under the Sherman law on account of that contract unless the prosecuting officer can prove the contract to be unreasonable. Several points are to be noted here:

(1) The action of the Commissioner is simply that of disapproval or failure to disapprove—a purely negative action. He is not required to approve. Unless he disapproves within thirty days, the contract can only be attacked if in unreasonable restraint of trade.

(2) The phraseology of the bill has led apparently many to believe that the Commissioner is here given the power to make a judicial finding. That is not so. The Commissioner, it is true, may disapprove the contract. The only question is, What is the effect of such disapproval? The sole effect of such action is to leave the contract as it is now under the present Sherman law. For that particular contract the Sherman law will remain in full force. This is the sole and entire effect of any action the Commissioner may take under this section of the bill. His disapproval does not make the contract unreasonable, does not make it void or illegal, is not binding upon any party thereto, and has none of the effects of a judicial finding. The sole effect is to leave that particular contract just where it is to-day.

If, on the other hand, the Commissioner takes no action on the contract, the bill itself operates automatically on that contract, and thereafter the prosecuting officer of the Government must prove that the contract is unreasonable in order to maintain suit on it under the Sherman law. The extent of power granted here and the effect of the Commissioner's disapproval is very limited, and has no resemblance to a judicial determination of facts. His disapproval has the simple result of leaving the contract exactly where it is if the bill should not be passed; that is, does not change the present status at all. The only change would occur when he takes no action at all. In such case the bill itself then operates automatically to relieve the contract from certain liability.

While this power is extremely limited, it is believed to be very desirable for the accomplishing in a legal and definite manner that which must be done in some way under my statute limiting restraint of trade. That is to say, the course of modern business is so widely affected by the Sherman law, and in such an indefinite way, that for any safe conduct of ordinary commercial operations it is essential that there should be some power given to the executive branch of the Government to indicate beforehand what its attitude will be as to a proposed combination. Section 10 will allow the business man who proposes to make a given contract to lay the matter before the executive branch of the Government and ask them beforehand how it will be viewed. Within thirty days he will thus find out either that his contract is believed to be contrary to public policy and may be attacked by the Government, in which case he would thereafter enter upon it at his own very proper risk, or he would learn, on the other hand, that the Government saw no *prima facie* reason to disapprove it, and he would then know that he could go ahead and base his operations upon it, and that so long as it was not against public policy it could not be attacked under the Sherman law; and this would be all the average business man would care to know. In practice there are continual applications on the part of business men to the executive branch to know whether such-and-such proposed transactions are criminal or not. At present the executive can make no satisfactory answer. In can only say to the business men: "We can tell you nothing; if you act you must take your chances." It is obvious that under a law so sweeping and drastic as the Sherman law business men are put at an extremely unfair disadvantage in carrying on ordinary modern transactions. It should be so that the Government can, by legal and regular methods, make its election as to the kind of contract which it will prosecute or will not prosecute, and be able so to advise the parties to that contract that they may act upon definite knowledge.

In essence this section provides merely a regular procedure, available for all parties, for exercising that discretion as to enforcement of law which is an inseparable part of administrative functions. While it is the duty of the administrative to enforce the law, it is inevitable that certain powers of discretion and selection belong to the enforcing officer.

Moreover, it is, of course, impossible that all of the law could always be enforced at once. Indeed, that is an elementary fact in administration, not often appreciated, that in administration it is always a question for the executive department what laws shall have enforcement, what laws shall not; or, at least, to the enforcement of what laws shall the Government direct its best efforts and first attention, and what laws shall by that process of procedure have a secondary enforcement. At all events, the executive department should have a free hand in this matter, and it gets that freedom for the exercise of its discretion from this condition of the law. (Wyman's Administrative Law, par. 11.)

An appeal is allowed to the supreme court of the District of Columbia from the cancellation of registration, because such cancellation partakes of the nature of a quasi-judicial act (of a sort frequently given to administrative officers) and calls for the exercise of discretion on the part of that officer, affecting the entire status of the given corporation.

No appeal lies from the finding or disapproval on the part of the Commissioner under section 10, for the reason that such finding is not in any sense judicial, but simply affects the action of the prosecuting officer, a matter within the administrative jurisdiction; and furthermore, the effect of this finding is primary only, because no specific rights are thereupon determined, and no final action is taken, and none can be taken until prosecution takes place in the regular judicial tribunal, at which time a judicial determination, of course, will be reached.

#### CORPORATIONS AND ASSOCIATIONS OTHER THAN INDUSTRIALS.

Slight differences in the treatment of corporations and persons other than industrial corporations appearing in the bill require some special notice.

The contracts of railroads are required to be filed with the Interstate Commerce Commission, as such matters are peculiarly within their jurisdiction, and no reports are required from railroads, because that subject-matter is already thoroughly covered in the interstate-commerce act.

Again, a slight difference of treatment, equally due to difference of subject-matter, appears in the case of corporations and associations not for profit and without capital stock, which would include, among others, labor unions, farmers' organizations, granges, and various voluntary and mutual associations. No such degree of information is required from these sources, because they do not have it to furnish, being, as above stated, without capital stock and not for profit, and yet also being probably within the purview of the Sherman law and as fully entitled as anyone else to make reasonable combinations for their own benefit.

Particularly in the case of labor unions is it necessary to allow reasonable combination under such bill. No sensible man desires either the abolition or restriction of the right of the workingman to combine to improve his condition, so long as he does so by proper and lawful means. Any State law which makes such combination illegal per se is peculiarly intolerable and contrary to public policy. If from the recent decision of the Supreme Court in the case above cited, *Loewe v. Lawlor*, the so-called "Danbury Hatters case," such condemnation of this fundamental right to combine may be deduced, it would illustrate this suggestion forcibly.

A further incidental feature of the bill is the change of the seventh section thereof, eliminating the allowance of treble damages. This was a purely statutory provision; it never existed at the common law, and there is no reason why any such exceptional rule should be applied to this particular tort, as distinguished from the ordinary rule in civil actions.

The provisions of section 3 of the said bill, page 7, lines 24 and 25, and page 8, lines 1 to 10, were intended and believed simply to safeguard the generally acknowledged right of employees to cease from working, by means of strike or otherwise, and of employers to discharge workmen, and the right of either of these parties to combine for the obtaining of satisfactory terms of employment. This is not intended in any way to legalize either the boycott or the blacklist. If it does so, it should be amended to prevent any such result.

Certain basic legal questions are connected with the general principles of this bill, which here require brief discussion.

RIGHT TO REQUIRE INFORMATION.

The bill, being wholly optional, does not present any way in which this constitutional question can be raised by court proceeding. Nevertheless, it is one of the prime objects of the bill to secure information, and therefore the right of the Federal Government to such information should be referred to.

It is believed that there is a clear right to such information concerning corporations engaged in interstate commerce as is provided for in the bill. The subject is substantially covered by the following cases in which the right of the Interstate Commerce Commission to certain classes of information was contested, and in which the right of the Government to information from carriers engaged in interstate commerce was broadly sustained:

*I. C. C. v. Baird*, 194 U. S., 25, page 44.

*I. C. C. v. Brimson*, 154 U. S., 481 et seq.

*I. C. C. v. Railway Company*, 167 U. S., 479 at page 506.

*In re Pacific Ry. Com'n*, 32 F. R., 241, 250.

*T. P. Ry. Co. v. I. C. C.*, 162 U. S., 197, 212-233.

The broad powers of the Federal Government to inquire into the affairs of an industrial company engaged in interstate commerce for the purpose of regulating such commerce are covered most recently and conclusively in the case of *Hale v. Henkel*, 201 U. S., 75.

In the case of *Interstate Commerce Commission v. Baird* (194 U. S., 25) the Commission requested the production for inspection of certain contracts, and the witnesses refused to permit them to be given in evidence. The circuit court held the contracts to be irrelevant, upon the ground that they related solely to intrastate transactions, and had nothing to do with interstate commerce. The contracts related to the sale of coal in Pennsylvania. It was held by the Supreme Court, reversing the circuit court, that the railroads being all engaged in interstate commerce, the Commission was lawfully authorized by law to inquire into their affairs and methods of doing business.

The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. \* \* \*

Upon the ground that they pertained to the manner of conducting a material part of the business of these interstate carriers, which was under investigation, we think the Commission had a right to demand their production.

A very important distinction was made in this case with regard to the right of the Government to require information, which distinction has become all the more significant in view of the recent decisions in the *Adair* and *Howard* cases (*Adair v. United States Supreme*



Court, January 27, 1908; *Howard v. Ill. R. R.*, same, January 11, 1908). At page 43 of the *Baird* case the court said:

It is to be remembered in this connection that we are not dealing with the ultimate fact of controversy or deciding which of the contending claims will be finally established. This is a question of relevancy of proof before a body not authorized to make a final judgment, but to investigate and make orders which may or may not be finally embodied in judgments or decrees of the court.

The disinclination of the court to draw any hard and fast lines as to the precise character of the information which may be sought for is disclosed in the following words of the court:

The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof.

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It (the Commission) is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business.

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An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information but of compelling, by all lawful methods, obedience to such rules.

The entire argument for the existence of this power can well be rested on the above quotation.

In *re Pacific Ry. Commission* (32 Fed. Rep., 241):

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And referring to the inquiries required in the taking of the census, the court in this case said:

And in addition to the inquiries usually accompanying the taking of a census, there is no doubt that Congress may authorize a commission to obtain information upon any subject which in its judgment it may be important to possess.

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exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over State corporations. \* \* \* Of course, in view of the power of Congress over interstate commerce, to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the fourth amendment.

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The *Howard* and *Adair* cases involved a final property right concerned in the relationship of employer and employee. It was obvious that certain forms of that relationship might have no connection with interstate commerce.

On the other hand, it is equally obvious that the information specified in this bill may and will always be directly relevant to interstate operations, and, further, that the securing of this information is not a final or conclusive determination, but merely a primary and preliminary step. To requote from the *Baird* case (*supra*):

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Furthermore, the practice for 18 years fully sustains this general power. Sections 12 and 20 of the interstate commerce act require very complete information from railroads, and, so far as is known, have been enforced and obeyed with hardly a protest from the railroad companies, and have been expressly sustained in the *Brimson* and *Baird* cases (*supra*).

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*Legal bearing of the word "reasonable" in connection with restraint of trade.*—The use of the word "reasonable" or of the phrase "unreasonable restraint of trade," as it appears in the bill, raises certain important legal questions, possibly the most important in the bill. These questions are:

(1) Is the phrase "unreasonable restraint of trade" sufficiently defined by court decisions, supplemented by economic principles, to afford a proper basis for the administration of the proposed act?

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Taking up the first point, reference is made to preceding quotations and citations herein, introduced for the purpose of showing that the *Trans-Missouri* case in the Supreme Court established the principle that the antitrust law applied to all combinations in restraint of trade, whether reasonable or unreasonable, and in these very decisions recognized this principle of common-law distinction.

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And in deciding whether or not a given restraint is reasonable, the courts have universally adopted the test laid down in the leading case by Chief Justice Tyndall:

"We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether or not the restraint is such a one as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable." (*Horner v. Graves*, 7 Bingham, 743, quoted with approval by Judge Taft in *U. S. v. Addyston Pipe Co.*, 85 Fed. Rep., 282.)

Mr. Justice Peckham, delivering the opinion of the court in the *Trans-Missouri* case, said:

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And Mr. Justice White, who delivered the opinion in which the four dissenting justices concurred, said:

It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void, or even voidable, unless the restraint which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine.

One of the few propositions upon which the entire court agreed was on the common-law distinction between reasonable and unreasonable restraint of trade.

As early as *Mitchel v. Reynolds* (supra) in the year 1711, we find reasons given for refusal to enforce such contracts, as follows:

1. The mischief which may arise to the party by loss of his livelihood.

2. To the public by depriving it of a useful member.

3. The great abuses these voluntary restraints are liable to from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible.

In another leading case upon this subject (*Alger v. Thacher*, 19 Pick., 51), the court stated forcibly the considerations of public policy involved:

(1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of present gain to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market.

An agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. (*Navigation Co. v. Winsor*, 20 Wall., 64.)

Summing up the *Maxim-Nordenfelt* case (App. Cas., 535) Mr. Justice White, dissenting in *Trans-Missouri* case (166 U. S., 847), said:

The matter was finally set at rest by the House of Lords in *Nordenfelt v. Maxim-Nordenfelt Company*. \* \* \* In this case it was held that \* \* \* whether a contract was invalid because of restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable.

The line \* \* \* between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions. (*U. S. v. Trans-Mo. Assn. (C. C. A.)*, 58 F. R., 67. Approved in *Dueber Watch case*, 66 Fed. R., 643 (C. C. A.).

The general principle of reasonableness though at first applied to contracts which were of very narrow scope, and where the restraint

in large part gone through a period of combination. For this reason the bill provides that registered corporations shall not be prosecuted under the Sherman law for existing and past combinations which are reasonable, and furthermore the bill provides a short period of limitation for all prosecutions under the Sherman law against all combinations, to wit, one year after the passage of this act. So many combinations have already been entered into that it would be unfair to leave these past combinations at the mercy of the original unmodified act, while applying the test of reasonableness to future combinations only.

#### POWER OF THE COMMISSIONER UNDER SECTION 10.

Having thus established the status of the past, the bill provides for the future in section 10, a section which has been subject to considerable misapprehension and which merits serious consideration.

In substance, this section provides that any person or registered corporation about to enter into a contract may submit the same to the Commissioner of Corporations. If the Commissioner does not, with the concurrence of the Secretary of Commerce and Labor, disapprove it within thirty days thereafter, no suit can be brought by the United States under the Sherman law on account of that contract unless the prosecuting officer can prove the contract to be unreasonable. Several points are to be noted here:

(1) The action of the Commissioner is simply that of disapproval or failure to disapprove—a purely negative action. He is not required to approve. Unless he disapproves within thirty days, the contract can only be attacked if in unreasonable restraint of trade.

(2) The phraseology of the bill has led apparently many to believe that the Commissioner is here given the power to make a judicial finding. That is not so. The Commissioner, it is true, may disapprove the contract. The only question is, What is the effect of such disapproval? The sole effect of such action is to leave the contract as it is now under the present Sherman law. For that particular contract the Sherman law will remain in full force. This is the sole and entire effect of any action the Commissioner may take under this section of the bill. His disapproval does not make the contract unreasonable, does not make it void or illegal, is not binding upon any party thereto, and has none of the effects of a judicial finding. The sole effect is to leave that particular contract just where it is to-day.

If, on the other hand, the Commissioner takes no action on the contract, the bill itself operates automatically on that contract, and thereafter the prosecuting officer of the Government must prove that the contract is unreasonable in order to maintain suit on it under the Sherman law. The extent of power granted here and the effect of the Commissioner's disapproval is very limited, and has no resemblance to a judicial determination of facts. His disapproval has the simple result of leaving the contract exactly where it is if the bill should not be passed; that is, does not change the present status at all. The only change would occur when he takes no action at all. In such case the bill itself then operates automatically to relieve the contract from certain liability.

While this power is extremely limited, it is believed to be very desirable for the accomplishing in a legal and definite manner that which must be done in some way under my statute limiting restraint of trade. That is to say, the course of modern business is so widely affected by the Sherman law, and in such an indefinite way, that for any safe conduct of ordinary commercial operations it is essential that there should be some power given to the executive branch of the Government to indicate beforehand what its attitude will be as to a proposed combination. Section 10 will allow the business man who proposes to make a given contract to lay the matter before the executive branch of the Government and ask them beforehand how it will be viewed. Within thirty days he will thus find out either that his contract is believed to be contrary to public policy and may be attacked by the Government, in which case he would thereafter enter upon it at his own very proper risk, or he would learn, on the other hand, that the Government saw no *prima facie* reason to disapprove it, and he would then know that he could go ahead and base his operations upon it, and that so long as it was not against public policy it could not be attacked under the Sherman law; and this would be all the average business man would care to know. In practice there are continual applications on the part of business men to the executive branch to know whether such-and-such proposed transactions are criminal or not. At present the executive can make no satisfactory answer. In can only say to the business men: "We can tell you nothing; if you act you must take your chances." It is obvious that under a law so sweeping and drastic as the Sherman law business men are put at an extremely unfair disadvantage in carrying on ordinary modern transactions. It should be so that the Government can, by legal and regular methods, make its election as to the kind of contract which it will prosecute or will not prosecute, and be able so to advise the parties to that contract that they may act upon definite knowledge.

In essence this section provides merely a regular procedure, available for all parties, for exercising that discretion as to enforcement of law which is an inseparable part of administrative functions. While it is the duty of the administrative to enforce the law, it is inevitable that certain powers of discretion and selection belong to the enforcing officer.

Moreover, it is, of course, impossible that all of the law could always be enforced at once. Indeed, that is an elementary fact in administration, not often appreciated, that in administration it is always a question for the executive department what laws shall have enforcement, what laws shall not; or, at least, to the enforcement of what laws shall the Government direct its best efforts and first attention, and what laws shall by that process of procedure have a secondary enforcement. At all events, the executive department should have a free hand in this matter, and it gets that freedom for the exercise of its discretion from this condition of the law. (Wyman's Administrative Law, par. 11.)

An appeal is allowed to the supreme court of the District of Columbia from the cancellation of registration, because such cancellation partakes of the nature of a quasi-judicial act (of a sort frequently given to administrative officers) and calls for the exercise of discretion on the part of that officer, affecting the entire status of the given corporation.

No appeal lies from the finding or disapproval on the part of the Commissioner under section 10, for the reason that such finding is not in any sense judicial, but simply affects the action of the prosecuting officer, a matter within the administrative jurisdiction; and furthermore, the effect of this finding is primary only, because no specific rights are thereupon determined, and no final action is taken, and none can be taken until prosecution takes place in the regular judicial tribunal, at which time a judicial determination, of course, will be reached.

#### CORPORATIONS AND ASSOCIATIONS OTHER THAN INDUSTRIALS.

Slight differences in the treatment of corporations and persons other than industrial corporations appearing in the bill require some special notice.

The contracts of railroads are required to be filed with the Interstate Commerce Commission, as such matters are peculiarly within their jurisdiction, and no reports are required from railroads, because that subject-matter is already thoroughly covered in the interstate-commerce act.

Again, a slight difference of treatment, equally due to difference of subject-matter, appears in the case of corporations and associations not for profit and without capital stock, which would include, among others, labor unions, farmers' organizations, granges, and various voluntary and mutual associations. No such degree of information is required from these sources, because they do not have it to furnish, being, as above stated, without capital stock and not for profit, and yet also being probably within the purview of the Sherman law and as fully entitled as anyone else to make reasonable combinations for their own benefit.

Particularly in the case of labor unions is it necessary to allow reasonable combination under such bill. No sensible man desires either the abolition or restriction of the right of the workingman to combine to improve his condition, so long as he does so by proper and lawful means. Any State law which makes such combination illegal per se is peculiarly intolerable and contrary to public policy. If from the recent decision of the Supreme Court in the case above cited, *Loewe v. Lawlor*, the so-called "Danbury Hatters case," such condemnation of this fundamental right to combine may be deduced, it would illustrate this suggestion forcibly.

A further incidental feature of the bill is the change of the seventh section thereof, eliminating the allowance of treble damages. This was a purely statutory provision; it never existed at the common law, and there is no reason why any such exceptional rule should be applied to this particular tort, as distinguished from the ordinary rule in civil actions.

The provisions of section 3 of the said bill, page 7, lines 24 and 25, and page 8, lines 1 to 10, were intended and believed simply to safeguard the generally acknowledged right of employees to cease from working, by means of strike or otherwise, and of employers to discharge workmen, and the right of either of these parties to combine for the obtaining of satisfactory terms of employment. This is not intended in any way to legalize either the boycott or the blacklist. If it does so, it should be amended to prevent any such result.

Certain basic legal questions are connected with the general principles of this bill, which here require brief discussion.

RIGHT TO REQUIRE INFORMATION.

The bill, being wholly optional, does not present any way in which this constitutional question can be raised by court proceeding. Nevertheless, it is one of the prime objects of the bill to secure information, and therefore the right of the Federal Government to such information should be referred to.

It is believed that there is a clear right to such information concerning corporations engaged in interstate commerce as is provided for in the bill. The subject is substantially covered by the following cases in which the right of the Interstate Commerce Commission to certain classes of information was contested, and in which the right of the Government to information from carriers engaged in interstate commerce was broadly sustained:

*I. C. C. v. Baird*, 194 U. S., 25, page 44.

*I. C. C. v. Brimson*, 154 U. S., 481 et seq.

*I. C. C. v. Railway Company*, 167 U. S., 479 at page 506.

*In re Pacific Ry. Com'n*, 32 F. R., 241, 250.

*T. P. Ry. Co. v. I. C. C.*, 162 U. S., 197, 212-233.

The broad powers of the Federal Government to inquire into the affairs of an industrial company engaged in interstate commerce for the purpose of regulating such commerce are covered most recently and conclusively in the case of *Hale v. Henkel*, 201 U. S., 75.

In the case of *Interstate Commerce Commission v. Baird* (194 U. S., 25) the Commission requested the production for inspection of certain contracts, and the witnesses refused to permit them to be given in evidence. The circuit court held the contracts to be irrelevant, upon the ground that they related solely to intrastate transactions, and had nothing to do with interstate commerce. The contracts related to the sale of coal in Pennsylvania. It was held by the Supreme Court, reversing the circuit court, that the railroads being all engaged in interstate commerce, the Commission was lawfully authorized by law to inquire into their affairs and methods of doing business.

The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. \* \* \*

Upon the ground that they pertained to the manner of conducting a material part of the business of these interstate carriers, which was under investigation, we think the Commission had a right to demand their production.

A very important distinction was made in this case with regard to the right of the Government to require information, which distinction has become all the more significant in view of the recent decisions in the *Adair* and *Howard* cases (*Adair v. United States Supreme*



Court, January 27, 1908; *Howard v. Ill. R. R.*, same, January 11, 1908). At page 43 of the *Baird* case the court said:

It is to be remembered in this connection that we are not dealing with the ultimate fact of controversy or deciding which of the contending claims will be finally established. This is a question of relevancy of proof before a body not authorized to make a final judgment, but to investigate and make orders which may or may not be finally embodied in judgments or decrees of the court.

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And Mr. Justice White, who delivered the opinion in which the four dissenting justices concurred, said:

It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void, or even voidable, unless the restraint which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine.

One of the few propositions upon which the entire court agreed was on the common-law distinction between reasonable and unreasonable restraint of trade.

As early as *Mitchel v. Reynolds* (*supra*) in the year 1711, we find reasons given for refusal to enforce such contracts, as follows:

1. The mischief which may arise to the party by loss of his livelihood.

2. To the public by depriving it of a useful member.

3. The great abuses these voluntary restraints are liable to from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible.

In another leading case upon this subject (*Alger v. Thacher*, 19 Pick., 51), the court stated forcibly the considerations of public policy involved:

(1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of present gain to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market.

An agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. (*Navigation Co. v. Winsor*, 20 Wall., 64.)

Summing up the *Maxim-Nordenfelt* case (App. Cas., 535) Mr. Justice White, dissenting in *Trans-Missouri* case (166 U. S., 847), said:

The matter was finally set at rest by the House of Lords in *Nordenfelt v. Maxim-Nordenfelt Company*. \* \* \* In this case it was held that \* \* \* whether a contract was invalid because of restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable.

The line \* \* \* between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions. (*U. S. v. Trans-Mo. Assn. (C. C. A.)*, 58 F. R., 67. Approved in *Dueber Watch case*, 66 Fed. R., 643 (C. C. A.).

The general principle of reasonableness though at first applied to contracts which were of very narrow scope, and where the restraint

was ancillary to a different purpose, has in the course of business development been found equally applicable to contracts of far greater importance and scope, and in no sense subsidiary or ancillary.

Most of the early decisions dealt with contracts whereby a man "contracted himself out of business," usually in connection with the sale of that business to some one else. The distinction therefore has at times been suggested in the course of argument that such contracts as may be referred to as ancillary may be reasonable, but that contracts which are not ancillary, but whose main or sole purpose is the restriction of competition, can not in any case be held reasonable at common law.

This distinction is not borne out by the cases or by general principles. First, as to general principle. It is hard to see how any restriction can be more complete, or more entirely suppress competition so far as the person making the restriction is concerned, than a contract where a man agrees to *entirely cease* to work at a certain business. If there is any merit in the suggestion that has been made in several cases, namely, that contracts which *regulate* competition are proper while those which totally suppress competition are improper and unlawful, it would seem that such "contracting out of business" is of the unlawful sort. It has nevertheless been sustained for several centuries. On principle, therefore, it would seem that if such a contract for the complete suppression of competition can be sustained, it would be proper to sustain a contract where the restriction only goes to a certain amount of the competition, as toward the regulation of prices, the amount of the output, methods of selling, etc., where the competition is by no means completely suppressed, but is merely regulated.

Taking up the cases on this question, there have been a number of well-considered decisions holding contracts in restraint of trade to be lawful which were not in any sense ancillary. In fact, very few, if any, cases exist where the decision is expressly based on any distinction between ancillary and nonancillary contracts.

The first report given on the subject in the Year Book involved the sale of a dyeing establishment, with the further agreement that the vender should not go into the dyeing business on that street in London for six months. The severity with which the courts handled cases of this kind is shown by the fact that this contract, which would, beyond all question, be sustained to-day, was held void, the judge remarking that if the plaintiff were in court he would go to prison until he paid a fine to the King.

There was an early period in English history when the courts set their faces against all restrictions upon trade alike, whether limited or unlimited. This period has long since passed away. (*Maxim-Nordenfeldt v. Nordenfeldt*, L. R. (1893), ch. 630, 651.)

Judges as far back as the reign of Henry V. and certainly during the reign of Queen Elizabeth, appear, as has been already stated, to have considered that even contracts in partial restraint of trade were uniformly void in law.

But as trade progressed it was necessarily discovered that a doctrine so rigid must be injurious to the State itself. In the same way and at about the same date by-laws which were in mere regulation of trade came to be distinguished from those which were in unlimited restraint of it. \* \* \* One reason for the adoption of a more elastic doctrine appears from the judgment delivered in *Broad v. Jolyffe* (Cro. Jac., 596). \* \* \* The courts, yielding to the prog-

ress of industry and commerce, finally decided that a man might restrain himself voluntarily and upon valuable consideration from using his trade in a particular place. (Monopolies and Industrial Trusts, Beach, p. 22.)

By later statutes there was an enlargement of the power of combination between workman and workman and between master and master for the purpose of maintaining and enforcing their respective interests and to remove the objection of being in restraint of trade to which some of the combinations had been obnoxious. (34 and 35 Victoria, chs. 31 and 39, and 40 Victoria, ch. 22.)

The law upon this subject in this country has followed somewhat the development in England, but it has not been confined by technical limitations established in that country. A court of equity in this country will inquire "not whether the restraint extends to an entire State or nation, but whether it is a reasonable and proper protection of the party in whose favor the covenant is made and whether it is prejudicial to the public interests." (Monopolies and Industrial Trusts, p. 28, Betch.)

*Mogul Steamship Company v. McGregor* (L. R., 23 Q. B. D., 598): This case is important for the present consideration from two points of view. First, because it represents a combination with no element of an ancillary contract, and, secondly, shows a remarkable development from the old *dyer's case* several hundred years prior, which change is due to the comprehensive development of the principle of combination in business which has taken place.

This case sustains as legal certain acts creating monopolies, for the increasing of or maintaining of prices, that had previously been held illegal and void. The acts complained of were restrictive contracts granting to merchants a rebate of 5 per cent on freights should they send all their freight from China by the combined lines. It was held that the association being formed by the defendants with a view of keeping the trade in their own hands, and not with the intention of ruining the trades of the plaintiffs, or through any personal malice or ill will toward them, was not unlawful, and that no action for conspiracy was maintainable.

It has been held that an agreement to parcel out among the parties to it the stevedore business of a port, and so to prevent competition among the parties and to keep up the price of the work, is not necessarily invalid if carried into effect by the proper means. (*Collins v. Locke*, 41 L. T., N. S., 292.)

It is perfectly lawful for the owners of three quarries to agree that they will sell their commodities upon terms suitable to themselves, and which they approve of; and although they know that the purchaser is going to supply, or offer to supply, the corporation of Birmingham with the commodity, that does not in the least restrict their right to deal inter se nor does such dealing deserve to be characterized as a conspiracy. There is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leaving one of them to make any other profit that he can. (*Jones v. North*, L. R. 19 Eq., 426.)

*Fowler v. Park* (131 U. S., 88): This case involved a contract not ancillary in its nature. The agreement provided that the parties should enjoy a monopoly of the sale of a patent medicine within a defined region in the United States, and provided further that the medicine should not be sold below a certain rate or price. It was held that this contract was not unreasonable or invalid as in restraint of trade.

*Wickens v. Evans* (3 Younge & J., 318): This case involved an agreement between these persons engaged in the manufacture of trunks and boxes; they divided up the territory of England into three parts and agreed that each would not go into or send into the territory of the other two, nor suffer any goods manufactured to go out of his reserved territory. They further agreed not to assist any person who opposed all, or any, or either of the parties; nor to purchase any tea chest or chests at a higher price than 6 pence or 8 pence each. They further agreed that in case any opposition should appear to them they would combine together for mutual and beneficial protection; that they would not act prejudicial to the interests of each other, but aid and assist each other in every way possible.

This contract for the division of territory was not an ancillary contract. It was sustained by the court.

In the opinion, Vaughan, B., stated: "In my opinion this was an honest and upright contract, which has been the question in all the cases; and a contract by which the parties are not injured, as they may be supplied on easier terms."

*Wiggins Ferry Company v. Chicago and Alton Railroad Company* (73 Missouri, 389): In this case the ferry company had by its charter an exclusive right to ferry all freight between St. Louis and the company's lands on the opposite Illinois shore. A contract was entered into with the railroad company by which the railroad company agreed that it would always employ the ferry company in transferring persons and property across the river. A clause in the contract declared that the object of the ferry company was to secure to declared that the object of the ferry company as to secure to itself the ferrying business between the Illinois and Missouri shores of all freights and passengers carried by the railroad company.

It was held that this contract was not void as being against the public policy, nor was it void as being in restraint of trade. Contracts are held void on this ground only when they operate a general restraint of trade. "This contract was limited in its operation to a single place, and at that place did not wholly prohibit the ferrying business, but only limited it to one company."

*Skrainka v. Scharringhausen* (8 Mo. App., 523): In this case, 24 persons, owners and operators of stone quarries in a section of St. Louis, agreed that in view of the great competition existing, with a tendency to depress the price of building rock so as to make it impossible to work quarries at a profit, it was desirable to agree on a plan which would secure a fair, proportionate sale of the produce at uniform prices and living rates. The contract provided that none of the subscribers would, for a period of six months, sell any building stone or produce of any quarry in St. Louis south of a fixed line, except as set forth in the agreement; an exclusive agent was appointed to sell on account of the contracting parties the stone of said quarries, giving each quarry its proportionate share, taking into consideration its location and producing capacity. The price of the rock was set out in the instrument. A supervisory committee of five was provided to see that the agent dealt fairly with each quarry, to adjust prices, and hear complaints. The sum of \$100 damages was fixed as liquidated damages for each violation of the agreement.

The defendant was sued for \$100 damages in violation of the agreement. There was no dispute as to the facts, the appellant contending that the agreement was against public policy.

The court said:

We are of opinion that the agreement in the present case is not one which clearly upon its face is mischievous and which ought to be declared void with a view to protecting individuals or the general public.

The court further stated that they knew of no case in recent times in which a contract such as the one above had been declared illegal.

*Manchester, etc., Railroad Company v. Concord Railroad Company* (N. H.) (20 Atl. Rep., 383): In this case, one railroad company was under a contract to use the roadbed, rolling stock, and equipment of another railroad company which was its rival and competitor. The contract was made for the purpose of preventing competition, but not for the purpose of raising prices of transportation above a reasonable standard. There was a statute (act of New Hampshire, July 5, 1867) forbidding the consolidation of competing railways and rendering illegal any contract whereby the roadbed, rolling stock, and equipment of one competing line is to be operated and controlled by another. This was pleaded in defense to a bill in equity for an accounting and return of consideration to plaintiff, whose property and equipment passed to the defendant under the contract.

The contract was held not to be void as against public policy.

See also *Chicago Railroad v. Pullman Company* (139 U. S., 79) (Pullman car exclusive contract); *Express cases* (117 U. S., 1); *Stock Yards Company v. Keith* (139 U. S., 128).

*Gibbs v. Consolidated Gas Company of Baltimore* (134 U. S., 396): This case involved an agreement between two competing gas companies in the city of Baltimore wherein they agreed to enter into an arrangement each with the other whereby the business of each might be conducted in a more profitable manner than at present. It seems that in this case, by a special statute, contracts of this character between public-service companies were inhibited and declared, by positive terms, to be utterly null and void, and the court refused to enforce the terms of the contract. But the court, through Chief Justice Fuller, makes the reservation that contracts of this character which are not against public policy are free from objections, and may be enforced.

Finally, the circuit court of appeals' decision in the *Trans-Missouri* case completely supports the argument as to the broad use of the word "reasonable." This is the leading case on the subject, as of course the decision of the Supreme Court in this same case eliminated the question of "reasonable" altogether and ended discussion of the matter after 1897.

In this decision the circuit court of appeals proceeded throughout on the broad use of the phrase "reasonable restraint" with no distinctions as to ancillary contracts, but solely with reference to the relation to general public policy.

Thus an examination of the cases shows that about one-third of those collected on the subject held valid contracts which were not ancillary. It must be remembered that such a class of contracts has only become frequent in very modern times, so that by far the greater number of decisions would naturally have to do with those earlier



contracts which were, by the very restricted nature of ancient trade, ancillary in their character. Had there been a long course of decisions applied to modern conditions, as there has been to ancient conditions, we would undoubtedly have had an equal or far greater number of decisions following this modern principle, upholding certain contracts in restraint of trade as reasonable, although not in any sense ancillary.

IS THE PHRASE SUFFICIENTLY DEFINITE?

The second question in connection with the use of this phrase "reasonable restraint of trade" is whether it imports an element of undue uncertainty into a criminal statute.

As pointed out in the cases cited above, the words have been largely construed in a great number of cases and over a long period of time. It should be further pointed out also that as a practical consideration the antitrust law, though criminal in part, has been chiefly applied as a civil statute. Practically all of the great cases more recently tried under this law have been by bill in equity and injunction. Very few, if any, criminal cases have ever been successfully brought to the issue of conviction under this law, as compared with hundreds of civil cases so successfully tried. As a practical question, therefore, this objection to the use of this phrase is relatively very unimportant. The objection will apply only in case of a criminal application of the law, and this criminal application, judging from the past, is quite infrequent.

As a legal consideration, also, the insertion of this phrase does not add to the indefiniteness of the present statute to such an extent as to be open to the objection referred to. Absolute certainty is not a prerequisite of a criminal statute, but simply such a degree of certainty as is reasonably possible in the description of the subject-matter.

The only case at all analogous which is opposed to this view is that of *United States v. Tozer* (52 Fed. Rep., 917), where it was held that there can be no conviction under the provisions of an act prohibiting undue preference in a case where the jury is required to determine whether the preference is reasonable or unreasonable.

*Elliott on Railroads*, a respectable authority, volume 4, page 723, states that this doctrine is opposed to that asserted in other cases.

In the case of *United States v. Baltimore and Ohio Railroad* (153 Fed. Rep., 997) the railroad was indicted under the same act for practicing unreasonable discrimination, and the indictment was held bad for not showing the *particulars* of the alleged unreasonable and unjust discrimination, but no such objection was raised to the act itself as was raised in the *Tozer* case.

In the case of *Czarra v. Board of Local Supervising Inspectors of the District of Columbia* (25 App. D. C., 443) the medical practitioner was convicted under the act of Congress approved June 3, 1896, of "unprofessional and dishonorable conduct." The point considered by the court was whether these words were sufficient to satisfy the sixth amendment, which preserves the right of the accused in all criminal prosecutions to be informed of the nature and cause of the accusation against them. In this case the court said:

This obvious duty must be performed by the legislature itself and can not be delegated to the judiciary. It may doubtless be accomplished by the use of

words or terms of settled meaning or which indicate offenses well known to and defined by the common law. Reasonable certainty in view of the conditions is all that is required, and liberal effect is always to be given to the legislative intent when possible.

The act of March 2, 1893, known as the safety-appliance law, makes it unlawful for any common carrier engaged in interstate commerce to run any train in such traffic that has not a "sufficient number of cars in it so equipped with power or train brakes that the engineer of the locomotive drawing such train can control its speed without requiring the brakeman to use the common hand brake for that purpose" (sec. 1).

A number of convictions have been had under this act, and the point of indefiniteness has never been successfully raised, if raised at all. In *Johnson v. Southern Pacific Company* (117 Fed. Rep., 469) the court said, referring to this act:

The act of March 2, 1893, is a penal statute. \* \* \* Its terms are plain and free from doubt, and its meaning is clear.

Coming now to the construction of the Sherman law itself in this connection, it will be observed that there was a period from 1890, when the law was passed, to 1897 (at which time the Supreme Court ruled the question of reasonableness or unreasonableness out of the matter entirely), during which time the consideration of the law in the more important cases practically inserted the word "reasonable," and yet during this entire period, which is the only period in which this particular question could have been raised, the question of indefiniteness as a penal statute was never raised, so far as is known.

The leading and conclusive case during this period was that of *United States v. Trans-Missouri Freight Association*, in the circuit court of appeals, 1893 (58 Fed. Rep., 58), decided by Judges Sanborn, Shiras, and Thayer. In this decision it was held that the act applied only to unreasonable restraint of trade. The court used the following language in discussing certain specified cases:

The main purpose of contracts of these classes that are thus held illegal is to suppress, not merely to regulate, competition. \* \* \* It is evident that there is a wide difference between such contracts and those the purpose of which is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight and only that which is necessary to accomplish this purpose.

And again:

These decisions rest upon broader ground, on the ground that the main purpose of the obnoxious contracts was to suppress competition, and that they thus tended to effect an unreasonable and unlawful restraint of trade.

And again:

There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial. \* \* \* If further authority is wanted for the proposition that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of the contracts that are claimed to be in restraint of trade, it will be found in—

a number of cases thereupon cited.

The court was of course fully aware that this was a criminal statute, and yet it construed it as containing exactly the phraseology that is now being criticised as being too indefinite.

It must be remembered that for the purposes of this argument this particular decision is final and conclusive. This is the decision of the highest court that has passed on the question of the use of the word "reasonable" in connection with the antitrust law. The Supreme Court eliminated the question entirely in 1897, so that it has not had occasion to pass thereon.

But the language of the Supreme Court itself in 1897 in the *Trans-Missouri* case is also significant, although it did eliminate this question. Four members of that court were of the opinion that the word "unreasonable" should be in the statute, with all the implication that that opinion carries as to the propriety of the use of that word, while the opinion of the majority of the court went so far as to use the following language in connection with this phrase:

These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it, and not this court.

In this connection, it is also necessary to refer to the language of Mr. Justice Brewer in the *Northern Securities* case (193 U. S., 361), where he said in regard to past decisions that "the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade," thereby giving his assent to the propriety of the use of such language in connection with the antitrust law.

In concluding the consideration of the use of this phrase it is possibly well to suggest also that, like all other branches of the law, the law of combinations must keep pace with economic conditions and be developed to fit modern facts; that while this phrase has already been construed for many years, it is fair to say that it involves one of the most important questions of public policy, and probably will have to be construed still further by the courts; that such necessity for further construction must be faced; that it is not to be avoided; and that the bill in question will of itself produce a necessary advance in that application of the law to modern conditions that modern conditions imperatively require.

#### "CLASS LEGISLATION" DEFINED.

This bill is not what is known as "class legislation." Accurately speaking, the legislation which is objected to under this rather crude term is legislation which is contrary to the spirit of the fourteenth amendment in failing to give to all citizens the equal protection of the laws. (It is, of course, to be remembered that the fourteenth amendment applies to the States and not to the Federal Government, but nevertheless the fundamental principle involved in that amendment is to a certain extent applicable to Federal legislation.)

Class legislation, or discrimination in legislation, is objectionable only when the discrimination is not based on substantial grounds of difference. The rule is that the line of classification must have a direct connection with the difference in privilege or duty pertaining to the different classes. Legislation by classes is the rule rather than the exception. Legislation differs when it is applied to railroads, to steamboats, to sail vessels, to industrial corporations, to banks, to insurance companies, to private citizens, and in innumerable other cases, each one of these classes being subject to certain special laws, and necessarily so. The sole question is whether the special legislation is justified by a corresponding special difference as to its objects.

In this bill corporations which give a certain high degree of information are allowed certain privileges. The connection between the two points is obvious and close and forms a proper basis for a regulation of interstate commerce. The bill admits that reasonable combination is proper. This is based on public policy. But if such combination, carrying as it does the possibility of the concentration of great industrial power, is to be allowed, it is a necessary corollary that it must be supervised and regulated; and supervision must have, as its first essential, the means of securing sufficient information. This feature is also based, therefore, on public policy. The distinction between the rights of registered and nonregistered corporations is fully justified by the distinction as to the methods of regulation and supervision which is thus given by such registration and the information obtained thereby. In other words, if the Government is to recognize, as it probably must, the tendency toward combination, it is obliged to have added powers of supervision, through publicity, as to the methods of such combination.

Therefore, the two features, privilege of reasonable combination and the duty of giving information, are not only relevant and properly connected, and form a true basis for a legal classification, but are essentially inseparable and must be enacted into law at one and the same time and in the same bill.

Legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment (the fourteenth amendment). (*Barbier v. Connelly* (Laundry case), 113 U. S., 27; *United Railway Company v. Beckwith*, 129 U. S., 26, and cases cited therein; *Railroad Cattle damage case*.)

Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. (*Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S., 155.)

The inhibitions of that section (section 1 of the fourteenth amendment) are laid upon the action of the several States and have no reference to legislation by Congress. (Chinese Summary trial, presumption of guilt; *In re Sing Lee*, 54 Fed. Rep., 337.)

The equal protection of the law \* \* \* does not forbid classification. \* \* \* The power of classification has been upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. (*Atchison Railway v. Matthews*, 174 U. S., 103. See also *Kentucky Railroad Tax cases*, 115 U. S., 321.)

#### SUGGESTED AMENDMENTS.

I would suggest certain amendments, largely matters of detail, as follows:

(1) Page 1, lines 8 and 9, strike out the words "affected by this act" and insert in lieu thereof "engaged in commerce among the States, or between a State and a Territory, or between a State and the District of Columbia, or with foreign nations."

(2) The section numbers of this act should be changed, section 8 being made section 9, etc., throughout the act, as apparently there was a clerical error in overlooking the fact that the present Sherman law has eight sections.

(3) Page 3, line 6, insert, after the words "action of" and before the words "the Commissioner," the words "cancellation by." This is to make it clear that the appeal provided for applies only to the cancellation of registration, as was intended by the wording here.

(4) Page 5, line 1, strike out the words "declaring that in his" and insert in lieu thereof the word "disapproving." Line 2 strike out the word "judgment" and the words "is in unreasonable." Lines 3 and 4 strike out the words "restraint of trade or commerce among the several States or with foreign nations," so that the clause as thus amended will read: "may enter an order disapproving such contract or combination." This is, in substance, all that is intended by this section. The phraseology stricken out is not necessary, and is somewhat misleading, inasmuch as it gives an appearance of a judicial finding greater in extent than is actually given by the section. The whole effect of the finding is expressed in lines 4 to 16 on page 5.

(5) Page 5, line 7, after the words "this act" and before the word "for," insert the words "against any corporation or association registered under this act or against any individual." This amendment is intended to cover the possible evasion of the provisions of the act. As the act now stands it is conceivable that corporations desiring to get the benefit of the act but not desiring to register might form a straw corporation which should register, include that corporation as a party to any contract which they desired to make, and then that corporation by presenting the contracts could get the benefit of the act, although the real parties in interest were unregistered corporations.

(6) Page 9, line 1, strike out the word "this" and insert in lieu thereof the word "the." Same line, after the word "immunity" and before the word "if," insert the words "provided in this section." This change is intended to make it clear that the limitation expressed in this clause applies to all the immunities referred to in section 4, and not merely to the one last mentioned.

Respectfully submitted.

HERBERT KNOX SMITH,  
*Commissioner.*

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[Telegram.]

BUFFALO, N. Y., March 6, 1908.

HON. CHARLES E. LITTLEFIELD.

*Chairman Subcommittee House Judiciary Committee.*

*Washington, D. C.:*

We join with other manufacturers throughout the country in protesting against any amendment to Sherman antitrust bill legalizing the pernicious boycott.

THE MALT MANUFACTURERS' ASSOCIATION OF BUFFALO, N. Y.

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[Metropolitan Drug Club.]

NEW YORK, March 26, 1908.

At the stated meeting of the Metropolitan Drug Club, held on Tuesday, March 24, the following resolutions were unanimously adopted:

"Resolved, That the Metropolitan Drug Club indorse bill H. R. 19745, introduced by Mr. Hepburn, and recommend and urge upon Congress its early passage; and

"Resolved, That a committee of three, to be appointed by the chair, attend the hearing before the Judiciary Committee of the House of Representatives on Friday next and there present the views of this association; and be it further

"Resolved, That such committee request the Committee on the Judiciary of the House of Representatives to add to the bill (p. 9, line 14) the following:

'But no such judgment or decree shall be held to prevent any person whatsoever from taking advantage of the benefits and immunities of this act in reference to any contracts or combinations hereafter made.'"

A true copy.

ALBERT L'AUT,  
Vice-President.

OFFICE OF THE ATTORNEY-GENERAL,  
Washington, D. C., March 31, 1908.

HON. JOHN J. JENKINS, M. C.,

*Chairman Committee on the Judiciary, House of Representatives.*

MY DEAR SIR: I am duly in receipt of your letter of the 28th instant, inclosing a copy of H. R. 19745. It will be some days before I can communicate further with the committee on the subject of this bill, inasmuch as it seems to be appropriate that I should consider very carefully the several important questions suggested by some among its provisions. As soon as possible, however, I shall be most happy to report on the said bill; and I remain,

Yours, most respectfully and truly,

CHARLES J. BONAPARTE,  
Attorney-General.

NATIONAL METAL TRADES ASSOCIATION,  
Syracuse, N. Y., April 2, 1908.

HON. J. J. JENKINS,

*House of Representatives, Washington, D. C.*

DEAR SIR: The members of the Syracuse Branch of the National Metal Trades Association beg to offer their protest against the enactment into law of the bills now before the Senate that aim to add to the power for evil now enjoyed by the labor organizations.

The aim of these bills is to treat the members of labor organizations as a special class, and, while these cases would be, as has always been done by the supreme courts, decided as unconstitutional, it would be some years before this could be brought about and all the evils these bills aim to accomplish would in the meantime have full swing.

The principle of injunction is to prevent crime, and, before the judges began to apply this principle to labor organizations, the burning of buildings, destruction of machinery, and the murder of nonunion men were frequent occurrences. The application of the injunction law has almost wholly stopped this. To enact the antiinjunction law, as applied to organized labor, means, if it means anything at all, to legalize the practice of these same crimes by the members of labor organizations, while denying it to other laborers and the rest of our own people. The leaders of labor organizations can not deny these statements, for before the application of the injunction to stop these crimes they did not ask for a change in the injunction law. The occasions where the injunctions have been applied otherwise than to prevent crime have been too few, if at all, to make a case, and to do away with it would be a grave mistake; and to do away with it in the case of a combination of people who have heretofore repeatedly committed crime when not restrained, and not only that, but a set of leaders who justify their men in it, and ask for the enactment of this law that they may freely indulge in it, will be an outrage on our boasted freedom.

We protest against it, not only on account of our own right, but because it will be an injustice to the workmen and laborers who do not feel disposed to become minions of the labor leaders.

The bill or bills that aim to change the laws permitting boycotting in any form is a move to permit organized labor to take means to destroy a manufacturer's business and prevent unorganized labor obtaining work. The aim and object of the boycott is to compel the employer to hire none but union men, and to force the nonunion men to join the union, both of which are morally, legally, and constitutionally wrong, and the laws ought by right to remain as they are.

The Government can refuse to employ men for over eight hours a day, and even refuse to purchase things upon which any man has labored more than eight hours, if it can afford it; but to promulgate a law that shall restrict others from working more than eight hours on other things is to deny the right of contract granted by the Constitution. In considering the enactment of a

law which shall compel the employer to compensate all employees for injuries sustained while in their service is a question which is likely to be approached while having in mind the great corporation, leaving out the question of what is the carpenter to do who hires a man to help shingle a roof, and the man takes a reckless chance, falls, and is injured or killed. If the law makes a distinction between the individual employer and the corporation, then this would drive workmen into the great corporations and embarrass the small companies and individual employers. Sad as it may be that men get injured and killed in their employment, many times through their own carelessness and the disobeying of orders, in a measure taking their own chances, is no more than the man does who embarks in a business and hires him; all workmen do not get injured; all employers do not succeed.

There are two sides to the question about the employee having helped build up the business; a company may employ a workman and he get injured the next day, in which case he has done nothing to build up the business; or people who have, through a life of work, obtained means to go into a new business; a man gets injured the next day. To what extent has he helped build up the business? A law on this subject needs to be well looked into, and as to the bills above referred to, we protest with all the power we possess against their enactment into law, not only as an organized body, feeble as compared to the Federation of Labor, but in the interest of the infinitely greater unprotected body, unprotected labor.

Yours, truly,

JOHN E. SWEET, *President.*

DENVER, COLO., April 2, 1908.

CHAIRMAN JUDICIARY COMMITTEE,

*House of Representatives, Washington, D. C.*

DEAR SIR: I have the honor to hand you herewith resolutions recently adopted by the Paint, Oil, and Varnish Club of Colorado, to which I trust you will give your immediate attention.

Very respectfully,

PAINT, OIL, AND VARNISH CLUB OF COLORADO.  
FRANK MCLESTER, *Secretary.*

Whereas the Paint, Oil, and Varnish Club of Colorado, having a membership of the principal paint, oil, and varnish manufacturers and jobbers of Colorado, find that certain measures now before the Congress of the United States if put into effect will prove detrimental to the business interests of each and every one of its members, be it

*Resolved*, That the protest of our club, and of its members individually, be submitted against the passage of the following bills:

- H. R. No. 94, introduced by Mr. Pearre;
- H. R. No. 69, introduced by Mr. Henry;
- H. R. No. 14377, introduced by Mr. Campbell;
- H. R. No. 61, introduced by Mr. Wallace;
- H. R. No. 9129, introduced by Mr. Reed;
- Senate No. 4727, introduced by Senator Gore;
- Senate No. 4533, introduced by Senator Beveridge;
- Senate No. 4487, introduced by Senator Bryan;
- Senate No. 4488, introduced by Senator Bryan;

and any other measures having for their purpose the prohibition of injunctions or restraining orders—especially as applied to industrial disputes—which are now or may later come before your committee.

As large employers of labor the members of this club realize that the only protection enjoyed by employers against the methods commonly resorted to render strikes effective by their interruption of work in establishments where they have been declared is to be found in the legal restraint of interference with those who are willing to accept employment on terms satisfactory to themselves and their employers. Preliminary injunctions in equity cases impose no delay in the securing of legal rights by those against whom they operate which could compare in the seriousness of its consequences with enforced idleness in establishments which are prevented from operating by the exercising of intimidation on the part of striking employees.

While the members of this club do not oppose the organization of labor, it is unnecessary for us to remind you that while the employer is financially responsible for his acts, there is often opposed to him perhaps equal or greater financial strength in many of the labor organizations, which have hitherto been impossible to hold accountable for pecuniary damages; and that the restraining effect of such possible penalizing has not been felt by those who permit the lawless spirit to go unchecked and allow the individual punishment to be risked by the individual offender whose responsibility may be reached only under the criminal laws. As criminal punishment affords no redress to the employer for pecuniary damages, his sole safeguard is the restraining order which operates to prevent such injury.

We therefore ask your committee to add the standing and importance of the industries that our club represents to the protests already lodged with you against the passage of these bills, which, for reasons obvious to you, are a menace to the rights and interests of every employer and of every man who desires to control his own services.

Very respectfully, yours,

THE PAINT, OIL, AND VARNISH CLUB OF COLORADO,  
W. F. MEYER, *President*.

STAMFORD, CONN., *April 3, 1908.*

CHAIRMAN OF THE HOUSE JUDICIARY COMMITTEE,  
*Washington, D. C.*

DEAR SIR: House bill 19745, known as the Hepburn amendment to the Sherman antitrust act, has come to our notice, and we understand that hearings on the bill by your committee are soon to be held, and we desire to enter our most serious protest against the passage of this bill.

It seems to us that the most pernicious results would follow its passage, while the actual good accomplished would be utterly insignificant.

As employers, we had begun to feel hopeful that through the impartial action of the courts some restraint would be put upon the amount of damage possible to be inflicted by the labor unions; and, as you may suppose, we view with the deepest concern any attempt to so change the existing laws as to deprive employers of this invaluable defense.

As to powers given to certain officials under the proposed amendments to the Sherman law, it seems as though second thought would be hardly necessary to make it evident that a most dangerous power is placed in the hands of individuals, and we feel assured that even those who look with disfavor upon the combinations of industrial institutions and their consequent power and aggression can not accept the Hepburn amendments as the proper cure for the evil of which they may very justly complain; the attempted cure would be worse than the disease.

Yours, very truly,

THE STAMFORD FOUNDRY COMPANY,  
WM. T. ANDREWS, *Secretary*.

[Chas. A. Schieren Company (established 1868), tanners, belt manufacturers.]

NEW YORK, *April 3, 1908.*

CHAIRMAN OF JUDICIARY COMMITTEE,  
*House of Representatives, Washington, D. C.*

DEAR SIR: If we understand aright, this amendment would legalize sympathetic strikes and boycotts, and it would make it lawful for an employee of any railroad to refuse to haul our goods if we had trouble with our employees. If this is correct, we respectfully wish to protest against it as being unfair and unwise. We recognize the right of an employee to organize and be organized, but so long as employees have the right to go and come as they please, the employer must have the right to employ whomsoever he pleases, without hindrance from any other employee.

Yours, respectfully,

CHARLES A. SCHIEREN COMPANY.



[Telegram.]

DAYTON, OHIO, April 3, 1908.

Hon. J. J. JENKINS,  
*Chairman House Judiciary Committee:*

For obvious reasons this association earnestly protests against favorable report by your committee on Hepburn bill amending Sherman Act.

DAYTON EMPLOYEES' ASSOCIATION.

[Telegram.]

DAYTON, OHIO, April 3, 1908.

Hon. JOHN J. JENKINS,  
*Chairman Committee on Judiciary, Washington, D. C.:*

For God's sake spare us such legislation as is proposed by the Hepburn bill, No. 19745.

DAYTON MANUFACTURING COMPANY.

ROCKFORD, ILL., April 4, 1908.

CHAIRMAN JUDICIARY COMMITTEE HOUSE OF REPRESENTATIVES,  
*Washington, D. C.*

DEAR SIR: We would respectfully enter our protest against the so-called "Hepburn bill," which has tendency to relieve labor unions from the provisions of the Sherman Act. The labor union is a bad thing for the manufacturers to fight, and the only satisfaction is a law that in a measure curbs their ambition to do and destroy both property and the manufacturer's reputation. The unions have now the right and opportunity to call strikes and other ways harass the manufacturers and that surely is enough. We feel sure you will use your best endeavor in behalf of the manufacturers and justice to all.

Yours, very truly,

UNION FURNITURE CO.,  
 P. A. PETERSON, *Secretary.*

[The Manufacturing Jewelers' Association.]

NEWARK, N. J., April 4, 1908.

Hon. JOHN J. JENKINS,  
*Chairman, Committee on the Judiciary,  
 House of Representatives.*

DEAR SIR: The members of the Manufacturing Jewelers' Association of Newark, N. J., are greatly concerned about the bill introduced by Mr. Hepburn (H. R. 19745), and desire to express their most earnest opposition to its passage. We are unalterably opposed to the establishment of any sort of a privileged class whether such a class be composed of capitalists or laborers. Laws should govern and protect all equally.

We have the greatest respect for the United States' courts, and protest against any attempt to restrict their powers or influence.

Throughout our entire history the judicial department of our Government has been so true to the high ideals of the founders that it has never failed us in any great emergency, and we feel that to transfer these sensitive and complicated matters that have heretofore come before the Supreme Court to the Commissioner of Corporations or the Interstate Commerce Commission, liable to frequent changes, or to be controlled by political influences at any time as by this bill seems to be provided, would be little short of a calamity.

We hoped the recent decision of the Supreme Court had settled the boycott for all time, but this bill seems to restore its iniquitous powers. There are so many points that are so obscure to the lay mind that we earnestly request that no action be recommended by your honorable committee that has not been very carefully and judicially considered in all its bearings, and that it is so

clear and explicit that the average citizen can comprehend its meaning, which is not the case with this bill.

If there is need of change in the laws under which our industrial system has developed, let the change or changes be made in a deliberate and judicial manner and solely for the best interest of all parties concerned.

Very respectfully,

GEO. R. HOWE, *President*,  
HARRY DURAND, *Secretary*.

[Lehn & Fink, wholesale druggists and manufacturing chemists.]

NEW YORK, April 6, 1908.

HON. CHAS. E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

MY DEAR SIR: I find that it is impossible for me to return to Washington and present verbally our views regarding the proposed amendment to the Sherman antitrust law (H. R. 19745), and in pursuance of the conversation held with you on Saturday, I inclose herewith copy of the resolutions passed by our organization, with the request that same be read to your committee and embodied in the printed report of the hearing.

It appears to us that the paragraph on page 9, lines 7-14, would exclude from the benefits of the proposed bill the entire wholesale, retail, and manufacturing drug trade of the United States in view of the decree entered in the circuit court of the United States for the district of Indiana entitled *The United States of America v. The National Association of Retail Druggists et al.*, No. 10593. We do not believe that the mere fact that we are the victims of an unjust law, which it is now proposed to change because of its injustice, is to debar us forever from receiving the protection of the amended law, and we most respectfully ask your committee to insert the additional clause as stated in our resolutions, in case the bill is reported favorably.

The arguments to which I listened and the objections made to many of the clauses of H. R. 19745 have considerably modified my views as to its practicability, and perhaps it may be a better method to refer the entire subject to a commission to be composed of members of the Congress and of experts on political economy, etc., who will consider the matter thoroughly, impartially, and from all view points, examine the laws of other civilized nations on the subject, and report their conclusions at some future time.

We are most certainly of the opinion that the Sherman antitrust law has in actual practice worked in a manner radically different from that contemplated by its framers, and should be changed or amended. Justifiable agreements in restraint of interstate trade, with a laudable or reasonable purpose, are in our opinion not opposed to public policy and should be encouraged rather than discouraged by modern statute law.

I enjoyed the hearing very much, and thank you for the courtesy shown me and for your permission to submit our views in writing.

Very respectfully, yours,

ALBERT PLAUT.

[Telegram.]

PITTSBURG, PA., April 6, 1908.

HON. CHAS. E. LITTLEFIELD,  
*Judiciary Committee, House of Representatives:*

Large part Pittsburg coal-mining industry oppose labor amendment Hepburn bill, as against free labor and honest industry in immunity to trade unionism and a club against free labor.

D. W. KUHN.

NEWARK, N. J., April 6, 1908.

JUDICIARY COMMITTEE, HOUSE OF REPRESENTATIVES,  
*Washington, D. C.*

GENTLEMEN: We earnestly request that the consideration you are now giving the Hepburn amendment to the Sherman antitrust act will tend toward protect-

ing the industries of the nation rather than take away any of the strength that is now contained in the present law.

The law as now applied gives ample protection to all classes, and no one is injured by its enforcement. As you know, the labor unions who are clamoring for modifications and changes in the present laws which protect the industries of the country comprise but 7 per cent of the working classes, and we hope that the requirements of the big majority and the justness of our request will aid you in continuing the law as it now is.

Yours, respectfully,

BAKER PRINTING CO.  
WM. A. BAKER, *President*.

[Pittsburgh-Westmoreland Coal Company.]

APRIL 6, 1908.

Hon. CHAS. E. LITTLEFIELD,  
*Chairman Judiciary Committee, House of Representatives.*

MY DEAR SIR: To-day I sent you a telegram opposing the labor amendment to the Hepburn bill, and I believe I voice the sentiment of the entire coal-mining industry of the Pittsburg district—that industry on which Pittsburg is founded—in opposing the proposed law which gives immunity and protection to an organization whose sole power lies in brute force, wanton and merciless, to any industry which sees fit to oppose it on grounds however reasonable and just. Is it not about time that free labor—labor that has been cuffed and kicked by trade unions and discriminated against by industries through fear—is getting a modicum of consideration and justice in this day of reformation and “square deal?” From their very nature, free labor and small capital can not give effective expression against proposed measures of this kind, but they feel it just as intensely as though they did; and after all, are they not the forces in this country, quiet and intelligent, that give virtuous direction to our progress and is the true spirit of wholesome Americanism? Labor trusts and capital trusts do not represent, by any means, the larger part of either labor or capital in this country, and the labor trust is the most relentless and merciless power this country has ever had. For seventeen years organized labor has favored the enforcement of the Sherman law; but when it is found to embrace labor trusts and conspiracies, the people of this country are called upon by Mr. Gompers and his associates, with demands ugly and threatening, that this law, now found to be inimical to labor conspiracies, must be wiped out; that the Supreme Court of the United States, that department of our Government into which expediency and passion never enter, must be roundly abused and its motives impugned, and we must embark on a wave of class legislation. The labor leaders are attempting to befog the minds of the people on the ground that mere organization of labor has been decreed a restraint of trade and comes within the Sherman law. There is no objection whatever to organization, but their method of conducting it, and when that method interferes with interstate commerce—becomes a conspiracy—either by wealth or conduct, it should fall within the ban of the Sherman anti-trust law, and I believe that is all that the Supreme Court held. If that be true, is there any reason for the Hepburn amendment, and would not the passage of that act have the effect of reserving to labor organizations privileges and power which could be used as a club on free labor, and if it could, that ought to be sufficient to prevent its passage. Why should not labor organizations be required to incorporate and their failure to carry out their contracts be cause for damages recoverable in money? They claim their agreements are “contracts of honor,” but in many instances the only honor in these agreements is in the name. When labor organizations are required to incorporate, and damages for breach of contracts with them be recoverable in money, it would be asking no more of them than you ask of your neighbor when you make a contract with him.

I wish to cite you a concrete case that has occurred with us in the last few weeks, where the miners' organization shut down a mine of ours because the pit boss, who is the agent of the State touching matters of safety, had placed a danger sign on the room of a miner, and because the pit boss would not permit him to work there he was able to call the miners out without taking up the matter with the company in accordance with the agreement made with the miners' organization, and shut the mine down indefinitely.

The mine was shipping coal to gas companies in Ohio and Michigan, and we had to procure coal from other mines. The great disaster of the Darr mine was supposed to have been caused by neglect on the part of the miners to observe the danger signs in the mine; and yet here was a miner with the miners' organization behind him, able to breach the agreement with the operators, to cause a strike, to interfere with interstate commerce, and to endanger the lives of his fellow-workmen.

Very truly, yours,

D. W. KUHN.

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[The Merchant Tailors' Protective Association of America.]

NEW YORK, April 7, 1908.

HON. JOHN J. JENKINS,  
*House of Representatives, Washington.*

MY DEAR SIR: The Merchant Tailors' National Protective Association of America, which I have the honor to represent, desires to enter a strenuous protest against House bill No. 19745, commonly known as the Hepburn amendment to the Sherman antitrust act.

Our objections to this bill are many, but will confine this protest to our more important objections.

First. We believe that it would be exceedingly unwise and would undoubtedly result sooner or later in gross injustice should judicial functions be conferred upon a single individual, the Commissioner of Corporations, and the Interstate Commerce Commission.

Second. We do not believe that the right to recover triple damages against an unlawful combination inflicting injury should be amended.

Third. As we understand the proposed amendment, should it become law there would be no appeal from the decision of the party upon whom these extraordinary powers might be conferred.

Fourth. Our experience teaches us that there is no such thing as peaceful picketing, and if this amendment is favorably acted upon strikers could continue, under cloak of the law, to commit the very crimes that have been committed in the past and yet go free.

Fifth. We believe that the law as it now stands is sufficient.

Sixth. Because the representatives of the Federation of Labor wish the boycott legalized is no reason why it should be done.

Seventh. The decision of the Supreme Court of the United States in the Loewe case we believe to be proper and just.

In our opinion new laws are not necessary at this time; rather let us say that the law as it now stands should be strictly enforced without regard as to whether it is a corporation, a labor union, or an individual who may offend.

Asking the consideration of your committee for this protest, I am,

Very respectfully, yours,

HARVEY ANDREW PATTERSON, *President.*

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[Frank P. Held & Co.]

PHILADELPHIA, April 7, 1908.

HON. JOHN J. JENKINS,  
*House of Representatives, Washington, D. C.*

DEAR SIR: We wish to lodge our protest against the favorable enactment of the proposed Hepburn amendment to the Sherman antitrust act as a most ingenious and dangerous piece of legislation affecting the business interests of this country yet proposed. It is probably unnecessary for us to point out to you the diabolical intent of this bill. This bill is now in your committee, and we trust that you will give our protest earnest consideration and see to it that it is not favorably reported by your committee to the House, which action on your part we consider will be for the very best interest of the country at large.

Yours, very truly,

OSCAR D. LOEB, *President.*

[Telegram.]

LYNN, MASS., April 8, 1908.

CHARLES E. LITTLEFIELD,  
*Chairman Committee on Judiciary, House of Representatives.*

We believe that House bill 19745 is a very dangerous measure to the prosperity and welfare of our country.

LYNN EMPLOYERS' EX.

NEW YORK, April 8, 1908.

CHAIRMAN JUDICIARY COMMITTEE,  
*House of Representatives, Washington, D. C.*

DEAR SIR: This organization wishes to voice its opposition to House bill No. 19745, commonly known as the Hepburn amendment to the Sherman antitrust law.

Yours, truly,

THE ASSOCIATION OF DEALERS IN MASONS' BUILDING MATERIALS.  
 By J. D. CARY, *Secretary.*

MCKEESPORT, PA., April 8, 1908.

CHAIRMAN JUDICIARY COMMITTEE,  
*House of Representatives, Washington, D. C.*

DEAR SIR: We beg respectfully to protest against any action being taken in the present term of Congress on the proposed amendments of the Sherman antitrust act which are now under consideration by your committee.

Without going into any argument in regard to the different clauses of the proposed amendments, it is enough to say that by legalizing all forms of strikes, boycotts, and black list the most grave and dangerous results may come to the manufacturing interests of the country, and there is a grave danger that unprincipled manufacturers and unprincipled labor leaders can legally work together to the detriment of the honest people of both classes.

We see no reason why an honest manufacturing concern can not live and prosper under the laws as they are at present, and we also see no reason why any change should be made, excepting after a very long and careful consideration by interests over the whole country.

Yours, respectfully,

FIRTH-STERLING STEEL COMPANY.  
 E. W. CLARKE, *General Manager.*

OFFICE OF THE ATTORNEY-GENERAL,  
 Washington, D. C., April 8, 1908.

HON JOHN J. JENKINS, M. C.,  
*Chairman Committee on the Judiciary, House of Representatives.*

MY DEAR SIR: Owing to the great pressure of my engagements at this moment and a slight indisposition, I find that it will not be practicable for me to respond to your letter of the 28th ultimo in such form as to assist the committee as therein suggested. To avoid further delay I have, therefore, requested the President to designate some other official to discharge the responsible duty of commenting upon H. R. 19745, and he has designated Mr. Herbert Knox Smith, Commissioner of Corporations, for the purpose. I am much indebted to you for sending me a copy of the bill, which I had not previously seen, and which I have examined with much interest.

Pray believe me, as ever,

Yours, most truly,

CHARLES J. BONAPARTE,  
*Attorney-General.*

[Buckeye Powder Company.]

PEORIA, ILL., April 8, 1908.

HON. WILLIAM P. HEPBURN,  
*House of Representatives, Washington, D. C.*

DEAR SIR: I have read press reports of the bill for modification of the so-called Sherman law, and request that you forward me a copy of the bill pending before the committee.

More than 75,000,000 people have for fifteen years paid tribute to a small crowd of millionaires who have held up this country and robbed us. Through an awakened public conscience and a fixed determination of the people to throw off this bondage to the trusts, the courts have found enough courage to enforce the Sherman law. It is true that this has been done in a very halting, indifferent manner, but it is accomplishing good results. It has checked in a great measure the devastations of the trusts, and if Congress does not interfere to shield the villains some good may be accomplished. The moment the Department of Justice succeeded in securing a favorable action by the courts in the enforcement of the law to protect the people, appeal is made to Congress to change and emasculate the law to protect the trusts.

I have been voting according to that precept "Let well enough alone," but am getting mighty tired of it. College professors and political economy theorists know nothing of this subject of trusts as compared with business men who have been sacrificed through the greed of the trusts.

The Department of Justice now has the Du Pont trust in the United States courts and is fighting for a dissolution of this trust, which is backed and supported at Washington and has its personal representative and advocate in the United States Senate. I have shown by detailed figures made up from the cost sheets of the trust that millions of pounds of powder supplied the United States Government per year by the Du Ponts costs 32 cents per pound and the Government pays 69 cents per pound for this powder, which yields more than 100 per cent profit. Why? Simply because the Du Pont trust controls the necessary parties, and through stock distributed gratis where it will do the most good.

I speak advisedly, for I know of one distribution of the stock of a smokeless powder company, a constituent of this Du Pont trust, which gave *gratis* to a United States naval officer attached to the Bureau of Ordnance stock in the powder company of the par value of \$50,000. I am not prepared to show whether this officer owns all the stock or whether he distributed a part of it to his colleagues, but it is enough to account for the purchase of powder at over 100 per cent profit. My friend who donated his stock was not the *largest* holder, and I do not know how much stock the large shareholders donated.

I trust your committee in the consideration of the question of changing the Sherman law will proceed with great care. This country is aroused on that special subject and I earnestly hope you will not weaken the law nor trust its enforcement to the care of any Department of Government that can be swayed by the use of money or stock. There is not an individual in the United States that does not daily pay tribute to the beef trust. There are dozens of other trusts that are piling up millions at the expense of the people. Probably one of the most obnoxious is the powder trust, and it receives little attention because it does not apply to the individual, but taxes the country as a whole.

There are thousands of good Republicans in Illinois and all Western States who will resent any weakening of the Sherman Act. No trust or civic committee ever thought of changing the Sherman Act until after the Supreme Court of the United States had enforced it. This bound all the lower courts; then it was discovered the law was too severe for the trusts. This is a good time to let it alone.

Very respectfully,

R. S. WADDELL.

[Merchant Tailors Society of the City of New York.]

NEW YORK, April 9, 1908.

Hon. JOHN J. JENKINS.

*Chairman Judiciary Committee, House of Representatives.*

MY DEAR SIR: The members of the Merchant Tailors Society of the City of New York in meeting assembled, Thursday, April 2, 1908, instructed the writer to file with your committee a protest against House bill 19745, known as the Hepburn amendment to the Sherman antitrust act, which we understand is now being considered.

We especially object to conferring judicial functions upon a single individual or the head of any Department of the Government, believing that such a course would be exceedingly unwise.

Entertaining as we do the highest respect for the Supreme Court of the United States, we do not believe that boycotts should be legalized, and the recent de-

cision of the honorable court above mentioned in the Loewe case meets with our hearty approval.

Triple damages against an unlawful combination inflicting injury are, in our estimation, perfectly proper, and we are opposed to having the Sherman Act amended so that only actual damage can be recovered.

We see no reason why the Federation of Labor or any labor organization should have special exemption from the Sherman Act or any other law.

We are opposed to strikers being practically authorized to commit crime and go unpunished.

We do not believe that the Federal judges have in a single instance done any injustice to any labor organization by reason of having issued a restraining order.

If labor unions were responsible, and damages could be collected from them, there would not be so much objection to having the present injunction laws modified so that a hearing might take place in a reasonable time before issuing a writ. But, should this course be pursued, what redress can the injured party have after his property is destroyed?

We have many other objections, too numerous to incorporate here, but we sincerely trust that consideration will be given to the objections we have stated above.

Very truly, yours,

LOUIS L. SCHWARTZ,  
*President.*

DETROIT, MICH., April 9, 1908.

HON. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

MY DEAR SIR: We have been noticing with much alarm the agitation of the Hepburn bill, amendment to the Sherman antitrust act. We have sent for copy of same, and in reading it over we were shocked to see what a calamity this bill would be to the manufacturer and the business interests of the country, should the labor unions in any way be successful in securing what they are desiring, to assist them in having it become a law.

We hope that as our Representative you will carefully investigate this matter and use your influence and good judgment in protecting the manufacturer and business interests of the country.

Yours, very truly,

BUHL MALLEABLE CO.,  
CHARLES A. RATHBONE,  
*General Manager.*

DETROIT, MICH., April 9, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee of House Judiciary Committee,  
House of Representatives,*

DEAR SIR: Referring to bill H. R. 19475, we beg to enter an energetic protest against the clause beginning with line 24, page 7, and ending on line 10, page 8, both inclusive.

Irrespective of the merits of the act otherwise, this clause is evidently an attempt by certain special interests to introduce into this bill authority to do things wholly foreign to the general intent of the bill, and the enactment of which into law would result in most serious consequences.

There is hardly a corporation in this country, no matter how small, but could be held under constructions which would be put upon this clause as being engaged in interstate commerce.

There are thousands of such corporations now securely conducting their business under legitimate and proper conditions satisfactory to themselves and to their employees who could and would be involved in endless trouble, expense, and damage through the action of those having absolutely no proper interests in the conduct of their affairs.

We most seriously protest against this clause.

Yours, very truly,

LLOYD CONSTRUCTION COMPANY,  
E. F. LLOYD, *President.*

DETROIT, MICH., April 9, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of House Judiciary Committee,  
House of Representatives.

DEAR SIR: It has been brought to our attention through the press and otherwise that a bill No. 19745 is now before your committee to regulate commerce among the several States and protect trade and commerce against unlawful restraints and monopolies.

We have endeavored, both myself and the stockholders connected with this institution, to read this bill over thoroughly, and in our judgment it is one that certainly should not be passed, as it is detrimental to the interests of every manufacturer and employer of labor in the United States. It looks to us that if such a bill as this (if our understanding of it is correct) should be passed that a manufacturer would practically not be able to run his own business, and such turmoil and general embarrassment as this would bring about would within a short while disrupt business generally and force capital to seek other sources of investment than manufacturing institutions. We believe that you will agree with us that just at this time, when the general outlook throughout the United States is rather of a pessimistic order, that even though there should be some parts of the bill that are meritorious, as a whole it certainly would be ill advised to have this bill passed at this time, and we therefore request that you and your committee use your utmost influence to see that this bill is not passed, feeling certain that you will serve the best interest of the people whom you represent by so doing.

Yours, very truly,

AMERICAN LUBRICATOR COMPANY,  
By WM. W. LEVYN,  
General Manager.

DETROIT, MICH., April 9, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of House Judiciary Committee,  
Washington, D. C.

DEAR SIR: We wish most emphatically to protest against bill H. R. 19745, otherwise known as the Hepburn bill, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

We can see nothing in this bill that will ameliorate the conditions already existing between employer and employee, but much that would tend to make conditions worse for both.

It seems to us that its provisions, especially that contained in section 3, page 8, will tend still further to prevent harmony in our industrial conditions and to permit unjust acts on the part of both the employer and employee.

We sincerely trust you will report unfavorably for the same and that our Representatives will prevent its passage.

Trusting you will give the matter your earnest consideration, we remain,  
Yours, very truly,

PENINSULAR ENGRAVING COMPANY,  
LEVI F. EATON, President.

DETROIT, MICH., April 9, 1908.

DEAR MR. LITTLEFIELD: We wish briefly to call your attention to House bill 19745, known as the "Hepburn amendment to the Sherman antitrust act," especially section 3. This is most pernicious legislation, dangerous not only to the business interests of the manufacturers of the country, but also to the citizenship at large, including the great mass of law-abiding workmen of this country. We trust the bill will be defeated in its present shape and that you will assist in so doing.

Assuring you of our high esteem and regard, we are,  
Yours, very truly,

GREAT LAKES ENGINEERING WORKS,  
By ANTONIO C. PESSANO,  
President and General Manager.

HON. CHARLES E. LITTLEFIELD,  
Washington, D. C.



DETROIT, MICH., April 9, 1908.

HON. CHARLES E. LITTLEFIELD,

*House of Representatives, Washington, D. C.*

DEAR SIR: We have been interested readers of the newspaper accounts of meetings of your committee to discuss the so-called "Hepburn bill," H. R. 19745. We have also read the provisions of the bill, and have read criticisms upon the bill from other sources, and the more we study it the more mischievous we think it is. We desire to protest most earnestly against the passage of the bill.

Apparently one of the main purposes of the bill is to grant more license to the labor unions. They do not need anything to encourage them to acts of viciousness. The recent interpretation of the Sherman Act by the courts has been just what it ought to be, and we do not think anything should be done to weaken the restraint which the law now exercises over labor unions. They expect to get advantages from it else they would not advocate it. They are already able to make themselves more than uncomfortable with any manufacturer who takes issue with them. They need further restraint rather than further license.

Yours, very truly,

MICHIGAN BOLT AND NUT WORKS.  
By E. T. GILBERT, *Treasurer*.

DETROIT, U. S. A., April 9, 1908.

HON. CHARLES E. LITTLEFIELD,

*Chairman, House of Representatives, Washington, D. C.*

DEAR SIR: We desire to file our earnest protest against the enactment of House bill 19745, commonly known as the "Hepburn amendment to the Sherman antitrust act."

The bill is certainly of revolutionary and dangerous character, more especially the clause granting privileges to combinations of labor and other interests which could be exercised to an extent which would work ruinous results, and results which would be disastrous to both employers and employees. If such privileges are permitted it would certainly result in paralyzing the business of the country and entail untold loss and suffering. Our selfish interest as employers is small compared to the loss and suffering which would ensue to a large number of laboring men whom we believe are not in favor of the enactment of such a bill if it includes such objectionable clauses as the last half of section 3. We therefore would urge that the bill do not pass or that it be materially amended so that its dangerous features should be eliminated.

Yours, very truly,

DETROIT STEEL PRODUCTS COMPANY.  
JNO. G. RUMNEY, *Treasurer*.

[Southern Supply and Machinery Dealers' Association.]

RICHMOND, VA., April 9, 1908.

HON. CHARLES E. LITTLEFIELD,

*House of Representatives, Washington, D. C.*

DEAR SIR: The members of this association are interested in the Hepburn amendment to the Sherman antitrust law. We believe that this amendment will be for the general good of the business interests of the country unless the labor amendment to legalize the boycott and blacklist is retained. This we are unalterably opposed to. We think that limited agreements within the letter of the law should be allowed among corporations and business men, but our membership are not prepared to stand for a bill that will legalize the boycott and blacklist.

We trust that you will give this matter your earnest attention.

Very truly,

ALVIN M. SMITH, *Secretary-Treasurer*.

[Southern Supply and Machinery Dealers' Association.]

RICHMOND, VA., April 9, 1908.

CHAIRMAN JUDICIARY COMMITTEE.

*House of Representatives, Washington, D. C.*

DEAR SIR: On behalf of the Southern Supply and Machinery Dealers' Association I beg to protest against the passage of House bill 19745, known as the "Hepburn amendment to the Sherman antitrust law," in so far as it refers to legalizing in interstate commerce the sympathetic and other forms of malicious strikes by legalizing a strike for any cause. Also in so far as it legalizes the boycott by permitting any form of peaceful combination of employees for obtaining from employers satisfactory terms for labor.

Also, in so far as it legalizes the blacklist by permitting employers to discharge employees for any cause and to combine and contract with each other for peaceably obtaining labor.

Also, it appears to us that this bill will legalize the worse forms of combination between employers and employees to fix the price of labor or of material, or to exclude laborers from employment, or employers from competition; the most harmful and oppressive agreements with which the industrial world has any experience.

And, finally, the proposed bill largely repeals the provision of section 10 of the Hepburn Act of 1887, which defines certain serious offenses in restraint of trade and commerce between the States.

We trust that you will consider this letter as a part of the record in your committee's consideration of this bill, and oblige.

Very truly,

ALVIN M. SMITH,  
*Secretary-Treasurer.*

DETROIT, MICH., April 10, 1908.

HON. CHARLES E. LITTLEFIELD,

*Chairman Subcommittee of House Judiciary Committee.*

DEAR SIR: We desire to enter a protest against the passage of House bill 19745, known as the Hepburn amendment to the Sherman antitrust act, which we understand is now under consideration by your committee.

We are opposed particularly to that portion of section 3 of the measure in which it is cited that it is not the intent of the amendment to interfere with or restrict the rights of employees to combine for the purpose of obtaining satisfactory terms for their labor or the right of combination or contract on the part of employers for the purpose of obtaining labor on terms satisfactory to them.

We believe this portion of the bill would be inimical to the interests of both employer and employee, and that it practically legalizes the boycott and other forms of malicious strikes as well as blacklisting by employers.

We sincerely trust, therefore, that the measure may meet with defeat.

Yours, respectfully,

BREDE &amp; SCHROETER.

DETROIT, MICH., April 10, 1908.

HON. CHARLES E. LITTLEFIELD,

*Chairman Subcommittee of House Judiciary Committee,**House of Representatives, Washington, D. C.*

DEAR SIR: We note that bill H. R. 19745, introduced by Mr. Hepburn as an amendment to the so-called Sherman antitrust act, is now under consideration before your committee.

We as employers are most directly interested in that part of the bill covered by section 3, pages 7 and 8, and believe that it is against the best interests of employers of all classes of labor throughout the country and also against the best interests of labor itself to have these clauses enacted into a law.

We sincerely hope that you will not report favorably on this bill.

We are sending a copy of this letter to the other members of the committee, also the Michigan Members of the House of Representatives and Senate.

Yours, very truly,

DIAMOND MANUFACTURING COMPANY.  
D. B. LEE, *General Manager.*

GRAND RAPIDS, MICH., April 10, 1908.

HON. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

DEAR SIR: We wish to call your attention to a measure which is now before your committee of the House of Representatives, and is known as the "Hepburn amendment to the Sherman antitrust act," and presented in House bill 19745.

As we interpret this amendment it legalizes sympathetic and all forms of malicious strikes, the boycott, the blacklist, and the worst forms of combinations.

We most emphatically protest against the passage of this measure and respectfully request that you do not report favorably for the passage of same.

Trusting that you will see your way clear to comply with our request, we are,  
Very truly, yours,

BUILDING CONTRACTORS' ASSOCIATION.  
HARRY E. HOSKEN, *Secretary*.

[Telegram.]

DETROIT, MICH., April 10.

HON. CHAS. E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

We are radically opposed to portion of section 3, Hepburn bill, virtually legalizing boycotts and blacklists. This would unquestionably be far-reaching and industrially destructive.

U. S. HEATER.

NEW YORK, April 10, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee of the Committee on the Judiciary,*  
*House of Representatives, Washington, D. C.*

DEAR SIR: Please find inclosed copy of preambles and resolutions unanimously adopted by our board of directors in opposition to the Hepburn amendments to the Sherman antitrust law and in favor of the creation of a commission to study the subject.

As arranged with your subcommittee, a delegation representing this association will appear at the hearing on Thursday, the 16th instant, to present in detail the views of our board of directors as expressed in the resolutions.

Yours, very truly,

THE MERCHANTS' ASSOCIATION OF NEW YORK,  
By S. C. MEAD, *Secretary*.

Whereas there is now pending in the House of Representatives at Washington a bill introduced by Mr. Hepburn on March 23, 1908, known as H. R. 19745, and a similar bill in the Senate, introduced by Mr. Warner, which are amendatory of the Sherman antitrust act of July 2, 1890; and

Whereas the courts have interpreted the Sherman Act as prohibiting all restraint of interstate commerce by combinations either of labor or of capital, of employers or of employees; and

Whereas before and since the passage of the Sherman Act it has been the established and increasing usage of our people, in relations affecting labor, industry, commerce, and transportation, to avail of contracts and agreements for purposes of mutual benefit which frequently, in greater or less degree, involve some measure of restraint of interstate commerce; and

Whereas there appears to be a widespread desire that the Sherman law should be amended so as to sanction combinations and agreements which are in justifiable restraint of interstate commerce and which have a reasonable or a laudable purpose, while regulating or forbidding those which are unreasonable; and

Whereas the Supreme Court of the United States, in the Trans-Missouri case, has intimated that one existing difficulty is the need of a standard or measure which would enable the courts to differentiate between reasonable and unreasonable contracts of this character; and

Whereas it therefore appears essential in constructing an amendatory act that some measure or standard should be determined upon and incorporated in any amendment to the law; and

Whereas such constructive legislation can properly be framed only by carefully collating, classifying, and analyzing the facts developed under the operation of the Sherman antitrust law: Now, therefore, be it

*Resolved*, That, in the opinion of the board of directors of the Merchants' Association of New York, after careful consideration of the proposed amendments and the issues to which they relate, it is expedient—

(1) That the said Hepburn-Warner amendment should not be enacted into law.

(2) That Congress, at this session, should create a commission, authorized and instructed to investigate the matter at issue, to collect evidence thereon from recognized representatives of labor, industry, commerce, and transportation at home and abroad, and to embody their conclusions in a report which shall include specific recommendations concerning further legislation at as early a date as may be feasible; and be it further

*Resolved*, That the active efforts of the Merchants' Association of New York be directed to the defeat of the said pending bills and to the endeavor to obtain the legislation necessary for the creation of such a commission.

HOUSTON, TEX., *April 10, 1908.*

HON. JOHN J. JENKINS,

*House of Representatives, Washington, D. C.*

DEAR SIR: We have followed closely in the public press and in current political literature the progress of the legislation now being advocated before Congress by the representatives of organized labor with the intent of relieving them from the penalties imposed on combinations in restraint of trade by the Sherman antitrust law, a matter brought into very strong relief by the recent decision of the Supreme Court in the Loewe case. The fact that the Supreme Court of the United States found itself forced to apply this law penalizing combinations in restraint of trade to labor organizations prosecuting boycotts, in spite of the fact that counsel for the defense repeatedly plead that the law was originally intended for the regulation of the combination of capital, strongly shows up labor as a commodity in commerce and a combination made with the intent of creating and maintaining a monopoly of that commodity as a trust in the truest sense of that term and one of the most pernicious trusts now enslaving our commerce.

The Citizens' Alliance of Houston, Tex., has a membership of 1,000 men—merchants, manufacturers, professional men, and employers and directors of labor generally. As a body we want to protest against any measures before your committee which will in the very slightest legalize a boycott or blacklist, or will reduce the penalty which the law now imposes for their use in a labor dispute. We protest against House bills Nos. 17137, 94, 69, 14377, 9129, 4487, and 4488, and especially against House bill No. 19745, introduced by Mr. Hepburn, of Iowa. We look with suspicion on any bill that would put into the hands of the Executive, through his appointee, the Commissioner of Corporations, the unique judicial function of deciding whether a given combination of capital and labor falls within the action of the law as reasonable or unreasonable. We believe such legislation to be un-American and opposed to the best interests of our people generally, including the working classes, and we propose to use our influence against all such measures and against the Members of Congress responsible for their introduction and progress.

Yours, respectfully,

CITIZENS' ALLIANCE,  
BOONE GROSS, *President.*  
MAURICE MANDEVILLE, *Secretary.*

[Penberthy Injector Company.]

DETROIT, MICH., *April 10, 1908.*

HON. CHAS. E. LITTLEFIELD,

*Chairman House Judiciary Committee, Washington, D. C.*

DEAR SIR: My attention has been called to House bill 19745, which I have carefully read. The part that appeals to me personally, as president of the above company (representing a large capital), is that referred to on page 8,

section 3, relative to strikes of employees, etc. The bill is couched in such language as to intentionally cover up the real meaning, but when stripped of all verbiage it simply legalizes strikes "for any cause," boycotts, etc.

This company desires to enter through me its protest against the passage of such a bill. It simply means revolution. The laboring class have already become bold, but with such a bill they would be a menace to the business industries of the country. I beg of you to use all your influence to throttle it when the time comes.

Yours, very truly,

PENBERTHY INJECTOR CO.  
S. OLIN JOHNSON, *President*.

BOSTON, April 10, 1908.

HON. CHARLES E. LITTLEFIELD,

*House of Representatives, Washington, D. C.*

DEAR SIR: We have carefully studied the Hepburn amendment to the Sherman antitrust law, which, we understand, has been referred to the Committee on the Judiciary, and we earnestly hope that the action of your committee on this matter may be unfavorable. Aside from the fact that it seems unjust and unreasonable in many details, it would evidently legalize some of the most vicious practices of our industrial organization. It is merely that it would apparently put the formal stamp of legality upon sympathetic strikes and boycotts, but it would equally legalize the blacklist and all the worst forms of combinations, whether positively crooked or merely oppressive.

We sincerely hope that if this is not already your own view, you will be led to adopt it with the result of an emphatically unfavorable report by your committee.

Yours, very truly,

THE CARTER INK'S CO.,  
By RICHARD B. CARTER, *President*.

[W. H. Coffee & Co., tailors.]

W. H. COFFEE CO.,  
Tailors,

CLEVELAND, April 10, 1908.

HON. JOHN J. JENKINS,

*Chairman Judiciary Committee, Washington, D. C.*

DEAR SIR: Our association, known as the Cleveland Protective Association of Merchant Tailors, strongly protest against the passage of bill No. 19745, commonly known as the Hepburn amendment to the Sherman antitrust law, which is now before you as chairman of the House Judiciary Committee.

We protest as individuals and as an association, as we believe that a labor union should not be granted rights not extended to an individual not belonging to labor organizations.

It is the sense of our association that we appeal to you to ask your help and cooperation to defeat this measure. We very strongly protest, and trust we may have your help to defeat a bill so notoriously unwise.

Trusting we may be assured of such favor from you, I am with best wishes,

Yours, respectfully,

W. H. COFFEE,  
*President Cleveland Protective Association.*

[The Merchant Tailors National Protective Association of America.]

CHICAGO, April 11, 1908.

HON. JOHN J. JENKINS,

*Chairman Judiciary Committee, House of Representatives.*

DEAR SIR: At a special meeting of Chicago Council, Merchant Tailors National Protective Association, held last evening, the question of House bill No. 19745, known as the Hepburn amendment to the Sherman antitrust act, was thoroughly discussed, and the members unanimously resolved that same was con-

trary to public policy and a detriment to the development of commerce and a limitation of the output of the manufacturers of the country.

The undersigned were instructed to acquaint you with this resolution and to protest against the passage of said bill.

We would therefore respectfully request you to use your efforts to prevent its passage.

Very respectfully, yours,

H. A. WILKIE, *President.*

F. V. SAUTER, *Secretary.*

DETROIT, MICH., April 11, 1908.

HON. CHAS. E. LITTLEFIELD,

*House of Representatives, Washington, D. C.*

HONORED SIR: Referring to House bill No. 19745, known as the Hepburn amendment to the Sherman antitrust act, we most earnestly request that you use your influence and utmost endeavors to defeat the passage of this bill.

To legalize strikes, boycotts, and similar combinations would in our opinion both permit and encourage an internal warfare throughout the entire country, which would mean serious loss and inconvenience to the public in general, personal injury and incidental loss of life by a mob violence, which would endanger the entire citizenship of this country.

The acts committed in the teamster strike in Chicago a couple of years since are still fresh in the memory of all who were brought into contact with any of its serious results, and with the Government stamp of approval would have been entirely uncontrollable.

By referring to the Government's statistics on the cost of strikes in the United States in the past twenty-five years, it will be noted that a loss has ensued which is almost incomprehensible. We believe that this will be the studied opinion of the vast majority of the law-abiding citizens of this country, and that such a measure can only be indorsed by persons who do so for personal gain, without seriously considering so dangerous a measure.

We trust and believe that your own personal opinion coincides with our view on the proposed amendment, and that your endeavors will be so directed as to bring considerable pressure against the measure so as to prevent any possibility of its being adopted.

Thanking you in advance in anticipation of your action, we remain,

Yours, very truly,

MILLER-SELDON ELECTRIC COMPANY.

WM. H. SELDON, JR.

DETROIT MICH., April 11, 1908.

HON. CHARLES E. LITTLEFIELD,

*House of Representatives, Washington, D. C.*

DEAR SIR: We desire to place ourselves on record as favoring a measure before Congress, known as the Hepburn bill.

We believe combinations under Government supervision an absolute necessity for the preservation of the smaller business concern. Present conditions allow the concentration of large capital under a corporate name, but deny the smaller dealer the right to have an understanding with his competitor. He must proceed to exterminate his neighbor or lay himself liable to the Sherman law.

At the present time, and for several years past, the salt industry in Michigan has been in a very demoralized condition, owing principally to lack of organization. The manufacturers are selling their product at practically cost of production.

No doubt independent manufacturers in other lines are suffering from similar conditions.

Trusting you will see your way clear to support this bill, we are,

Very truly, yours,

DETROIT SALT COMPANY,  
Per J. M. MULKEY.

[Robt. T. Teakle, building contractor.]

DETROIT, MICH., April 11, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Chairman subcommittee Committee on Judiciary,  
House of Representatives.*

DEAR SIR: I desire earnestly to protest against the enactment of H. R. 19745, the Hepburn amendment to the Sherman antitrust act, particularly the section exempting certain acts of labor organizations from its provisions (sec. 3), which, in my opinion, would be detrimental to the interests of all concerned.

Respectfully,

ROBERT T. TEAKLE

[A. C. Goodall, contractor. Plastering.]

DETROIT, MICH., April 11, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Subcommittee of Judiciary Committee,  
House of Representatives.*

MY DEAR SIR: I wish to protest against the favorable consideration by your committee of the Hepburn bill (H. R. 19745), as I believe that section 3, which legalizes acts of labor unions which are at present unlawful, is very unjust, and trust your committee will make an adverse report on the bill.

Very respectfully,

ALFRED C. GOODALL.

DETROIT, MICH., April 11, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee of House Judiciary, Washington, D. C.*

DEAR SIR: We earnestly protest against the passage of House bill No. 19745, Hepburn amendment of the Sherman law. This bill would legalize many things morally wrong and now rightfully held to be illegal, including such institutions as the backlist and boycott. It is also grossly discriminatory in other clauses. It seems to us that it will further enhance the centralization of central power in Washington, a tendency that we think has gone far enough.

The bill further has the appearance of being drawn by impractical theorists.

We earnestly hope it may be dropped, and that quickly.

Sincerely, yours,

NORTHERN ENGINEERING WORKS.  
GEO. A. TRUE,  
*President and Manager.*

APRIL 13, 1908.

HON. CHARLES E. LITTLEFIELD, *Chairman,*  
HON. GEORGE R. MALBY,  
HON. ROBERT L. HENRY,  
*Subcommittee of House Judiciary Committee.*

GENTLEMEN: Our attention having been called to the Hepburn amendment bill, known as House bill 19745, we seriously object to the passage of this bill, especially section 3, and would solicit your earnest effort to defeat the same.

Respectfully,

BUILDERS' EXCHANGE OF BAY CITY, COMMITTEE.

ANN ARBOR, April 13, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Washington, D. C.*

DEAR SIR: I take this means to express my disapproval of the passage of the bill known as the Hepburn amendment to the Sherman antitrust act. It will place the employer absolutely in the power of the labor unions, from which

there is no appeal. It authorizes and legalizes boycotts, strikes, and all sorts of unjust acts dangerous to and ruinous to the employers of labor.

Trusting you will exercise a most vigorous protest,  
I am, yours, truly,

HENRY BLETOW,  
*Contractor and Builder.*

PORTLAND, ME., April 13, 1908.

HON. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

MY DEAR SIR: I take this opportunity, in behalf of our Wholesale Grocers' Association, which represents practically all the wholesale grocers in Maine, including those of your home city, to ask, provided you can see your way clear to do so, if you will use your efforts in behalf of an amendment to the Sherman antitrust law which will make it possible for corporations, business associations, labor or agricultural organizations to make trade or other agreements which are not in unreasonable restraint of trade?

The more we hear of the objections to the labor cause in this bill, the more we believe the objections are good. Our attorney, acting in behalf of the Wholesale Grocers' Association, takes the position that if there is any doubt about this clause legalizing interstate boycotts, the bill should be amended to that extent.

He also takes the position that an appeal from the decision of the Commissioner of Corporations should be allowed.

Asking your favorable consideration in the interests of good business and fair and equitable compensation for doing business, I remain,

Very truly, yours,

PORTLAND WHOLESALE GROCERS' ASSOCIATION,  
By F. B. MILLIKEN, *President.*

[International Salt Company of Illinois.]

TOLEDO, OHIO, April 13, 1908.

CHAIRMAN OF THE JUDICIARY COMMITTEE,  
*Washington, D. C.*

DEAR SIR: The amendment to the Sherman antitrust act having come before my notice, I wish to make a strong protest against the passage of this amendment as I fully consider the disastrous effect that the passage of same would have. It legalizes acts of unions or gangs which would mean imprisonment for me or another individual.

Trusting that this letter will be considered, I remain,

Very truly, yours,

THOS. B. RANKEEN, *Agent.*

[Geo. E. Gibeault, tailor.]

CHICAGO, April 13, 1908.

HON. J. J. JENKINS,  
*Chairman Judiciary Committee, House of Representatives.*

DEAR SIR: I desire to register my protest against House bill 19745 and request you to use your efforts to prevent its passage, as same is pernicious and a menace to the industries of the country.

Very respectfully, yours,

GEO. E. GIBEAULT.

DETROIT, MICH., April 13, 1908.

HON. CHAS. E. LITTLEFIELD,  
*Chairman Subcommittee of House Judiciary Committee,  
Washington, D. C.*

DEAR SIR: The writer begs to draw your attention to House bill No. 19745, and particularly to section 3 of the bill. That part of the amendment provided in this section legalizes in interstate commerce the sympathetic and all forms of malicious strikes by legalizing a strike "for any cause," and thus mak-



ing the intent of the strikers of no consequence. It legalizes the blacklist by permitting employers to discharge employees for any cause, and to combine and contract with each other for peaceably obtaining labor. It legalizes the worst forms of combination between employers and employees to fix the prices of labor or of material, or to exclude laborers from employment, or employers from competition.

May the writer ask you to exert your influence toward the bill's defeat?

Yours, truly,

DETROIT SANITARY SUPPLY COMPANY,  
A. C. COGSWELL, *Vice-President.*

ST. CLAIR, MICH., *April 13, 1908.*

HON. CHAS. E. LITTLEFIELD,  
*Washington, D. C.*

DEAR SIR: After giving it a somewhat careful examination, we believe that the measure now before Congress, known as the Hepburn bill, is a commendable one. Under certain circumstances we consider that combinations can be made to the advantage of all concerned, and especially to the advantage of the small dealer. When such combinations are made under proper restrictions we believe there is little danger that harm will result from them. The Hepburn bill seems to provide for all necessary restrictions, and in this and in other respects it meets with our approval. It would be very satisfactory to us, therefore, if you could give the measure your support.

Yours, respectfully,

DIAMOND CRYSTAL SALT CO.

[Detroit Copper and Brass Rolling Mills.]

DETROIT, MICH., *April 13, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee of House Judiciary Committee.*

DEAR SIR: We desire to register with you our emphatic protest against the passage of House bill No. 19745, introduced by Representative Hepburn.

Without attempting to go into details, we believe that the bill as a whole is vicious and that its passage would result in incalculable injury and inconvenience to the Government and to manufacturers generally.

Requesting your influence against the bill,

Yours, very respectfully,

L. H. JONES, *President.*

[New York State and Northern Pennsylvania Stove Manufacturers' Association.]

ALBANY, N. Y., *April 13, 1908.*

HON. C. E. LITTLEFIELD, M. C.,  
*Washington, D. C.*

DEAR SIR: The following resolution was voted unanimously by the members of the New York State and Northern Pennsylvania Stove Manufacturers' Association at their meeting in New York City on Thursday, the 9th instant:

"Resolved, That the secretary of the New York State and Northern Pennsylvania Stove Manufacturers' Association be instructed to address the chairman of the Judiciary Committee of the United States House of Representatives and the Senators representing New York State, in urgent opposition to the Hepburn amendment, as embraced in House bill No. 19745, as being dangerously subversive of the interests of American industries, employers, and employees, as well as the people at large.

"The present exigency in commercial and industrial circles would, we believe, be made more intense by the passage of the bill at this time, when all possible encouragement should be given to our lagging industries and toward a return of confidence and a peaceful harmonizing of the differences between capital and labor.

"Carried unanimously."

It seems useless for me to say anything more, as the resolution itself expresses the opinion of each and every member of the association.

Respectfully, yours,

JNO. D. GREEN, *Secretary.*

PHILADELPHIA, PA., April 14, 1908.

HON. JOHN J. JENKINS,  
*Chairman Judiciary Committee, House of Representatives.*

DEAR SIR: We desire to enter our protest against favorable action by your committee upon House bill No. 19745, commonly known as the Hepburn amendment to the Sherman antitrust act.

We object to the bill for the following reasons:

1. The bill takes away from the judiciary many functions hitherto exercised by them and confers them upon executives.
2. The bill places no restraint upon voluntary or unincorporated associations in the making of contracts or combinations, while it exercises stringent supervision of the rights of corporations to make contracts or combinations.
3. It repeals the clause of the Sherman Act providing for the recovery of triple damages for injuries sustained and only allows recovery for actual damages sustained.
4. The bill legalizes in interstate commerce the sympathetic and all forms of malicious strikes by legalizing a strike for any cause, making the intent of the strikers of no consequence.
5. The bill legalizes the boycott.
6. The bill legalizes the black list.
7. The bill legalizes the worst forms of combinations between employers and employees, such as have been construed by the courts to be in restraint of trade.

Very truly, yours,

THE MERCHANT TAILORS' EXCHANGE OF PHILADELPHIA.

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[Schaub Brothers, importing tailors.]

CHICAGO, April 14, 1908.

HON. J. J. JENKINS,  
*Chairman Judiciary Committee, House of Representatives.*

DEAR SIR: We wish to enter our protest against the passage of House bill 19745, commonly known as the Hepburn amendment to the Sherman antitrust act.

Respectfully, yours,

SCHAUB BROTHERS,  
By L. J. SCHAUB.

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DETROIT, MICH., April 14, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee of Committee on the Judiciary,  
House of Representatives.*

DEAR SIR: Our attention has been called to the Hepburn bill, H. R. 19745, and at this time we desire to urge your utmost endeavor toward the defeat of this bill.

As employers of labor we must protest against the passage of the bill, particularly those sections that, to our minds, legalize strikes, picketing, boycott, and other combinations most injurious to honest, law-abiding capital and labor.

Respectfully,

WINN & HAMMOND.

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[Telegram.]

CHICAGO, April 14, 1908.

HON. J. J. JENKINS,  
*Washington, D. C.:*

House bill 19745, commonly known as Hepburn amendment, is most dangerous and unjust, and we protest against its passage, and against the passage of the amendment of Senator Warner, and request your influence and vote for the defeat thereof.

THE DEVORE CO.

[Telegram.]

TOLEDO, OHIO, April 14, 1908.

CHAIRMAN JUDICIARY COMMITTEE,  
House of Representatives, Washington, D. C.:

We desire respectfully but most earnestly to protest the passage of House bill 19745.

EDWARD FRED PLATE GLASS Co.

[Telegram.]

NEW YORK, April 15, 1908.

HON. CHARLES E. LITTLEFIELD,  
House of Representatives, Washington, D. C.:

We urge respectfully that you work and vote against the Hepburn-Warner amendments to Sherman antitrust law, and we request that you work and vote for a bill to create a commission to prepare suitable amendments.

THE ANSONIA CLOCK Co.

[The New York Lumber Trade Association.]

NEW YORK, April 15, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee on the Judiciary, House of Representatives.

DEAR SIR: By unanimous vote of this association I am directed to urge you in your official capacity to work and vote against the Hepburn and Warner amendments to the Sherman antitrust law. We favor the resolution in opposition thereto as adopted by the board of directors of the Merchants' Association of this city, of which you have had notice.

Trusting that this matter will receive your thoughtful attention, we are,  
Yours, truly,

J. D. CARY, Secretary.

NEW YORK, April 15, 1908.

HON. CHARLES E. LITTLEFIELD,  
Washington, D. C.

DEAR SIR: At the request of the Merchants' Association of New York, of which we are members, we are urging you to vote against the Hepburn and Warner amendments to the Sherman antitrust law, and to work and vote for a bill to create a commission to prepare suitable amendments.

Trusting that you may see your way clear to comply with our request, we are,  
Respectfully,

CLAFLIN, THAYER &amp; Co.

NEW YORK, April 16, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of Judiciary Committee, House of Representatives.

DEAR SIR: The Hepburn and Warner amendments to the Sherman antitrust law would, if passed, prove detrimental to our interests, and we are therefore opposed to them.

We respectfully urge you to work and vote against these amendments and to work and vote for a bill to create a commission to prepare suitable amendments.

We are, sir, respectfully, yours,

C. G. GUNTHER'S SONS.  
LOUIS F. GEORGES, Vice-President.

[Telegram.]

NEW BRITAIN, CONN., April 16, 1908.

CONGRESSMAN CHARLES E. LITTLEFIELD,  
Washington, D. C.:

We protest against the dangerous tendency of the Hepburn amendment.

CHARLES E. GLOVER,  
President Corbin Screw Corporation.

[Telegram.]

NEW BRITAIN, CONN., April 16, 1908.

Congressman CHARLES E. LITTLEFIELD,

Washington, D. C.:

Hepburn amendment to Sherman Act dangerous legislation because of unequal treatment of corporations, and dangerous precedent in placing autocratic power in hands of any commissioner.

P. CORBIN,

President American Hardware Corporation.

[Telegram.]

DETROIT, MICH., April 16, 1908.

HON. CHARLES E. LITTLEFIELD,

Chairman Subcommittee House Judiciary Committee,

Washington, D. C.:

We disapprove the enactment of H. R. 19745, Hepburn amendment to Sherman antitrust act, and protest against its favorable consideration by your committee.

MASON CONTRACTORS ASSOCIATION OF DETROIT.

[Telegram.]

NEW BRITAIN, CONN., April 16, 1908.

Congressman CHARLES E. LITTLEFIELD,

Washington, D. C.:

Earnestly protest passage of dangerous legislation of the so-called Hepburn amendment to Sherman Act.

CHAS. H. PARSON, President P. and F. Corporation.

[Telegram.]

NEW BRITAIN, CONN., April 16, 1908.

HON. CHARLES E. LITTLEFIELD,

Washington, D. C.:

On behalf of business men of Connecticut we protest against legislation as in the Hepburn bill, believing it against best interest of our citizens.

A. H. ABBE,

President State Business Men's Association.

[Telegram.]

MENOMONIE, WIS., April 16, 1908.

Congressman J. J. JENKINS,

Washington, D. C.:

Please support Hepburn bill 19745.

J. H. STOUT.

NEW YORK, April 16, 1908.

HON. CHARLES E. LITTLEFIELD,

Chairman Subcommittee of the Judiciary Committee,

House of Representatives.

DEAR SIR: We respectfully urge you to work and vote against the Hepburn and Warner amendments to the Sherman antitrust law, and to work and vote for a bill to create a commission to prepare suitable amendments.

Yours, respectfully,

H. KOHNSTAMM & Co.

[Office of Strouse, Adler & Co., importers, manufacturers, and converters of corset materials.]

NEW HAVEN, CONN., April 16, 1908.

Congressman CHARLES E. LITTLEFIELD,  
Washington, D. C.

DEAR SIR: We desire to add our protest to those you have already received against the passage of the Hepburn bill, and object, not only to the unequal treatment of corporations and voluntary associations, but also to the autocratic power placed in the hands of the Commissioner of Corporations, which practically requires every corporation doing an interstate business to keep its books open to the public.

Very truly, yours,

ISAAC M. ULLMAN.  
STROUSE, ADLER & Co.

[S. Langsdorf & Co., manufacturers of holiday goods.]

NEW YORK, April 16, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee, Judiciary Committee of the House.

DEAR SIR: The Merchants' Association of New York, of which we are members, have called our attention to the "Hepburn and Warner amendments to the Sherman antitrust law of 1890," and request us to use our influence against this bill.

After carefully looking over the reasons therefor, we fully agree with them, and now take the liberty to ask you, as chairman of the subcommittee of the Judiciary Committee of the House, to do all you can to defeat this bill.

Trusting that this will meet with your own views, we are,

Yours, very respectfully,

S. LANGSDORF & Co.

[Telegram.]

DETROIT, MICH., April 16, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee Judiciary Committee, Washington, D. C.:

The Builders' Association of Detroit, representing 150 of the leading building contractors of this city, are strongly opposed to section 3 of H. R. 19745, Hepburn bill, disproving of any provision exempting one particular class.

JOHN H. LAURIE, President.

[Telegram.]

NEW BRITAIN, CONN., April 16, 1908.

HON. CHAS. E. LITTLEFIELD, Washington, D. C.:

The Hepburn bill should be defeated; it gives to the Bureau of Commerce unnecessary powers of inquisition.

NORTH & JUDD MANUFACTURING COMPANY.

[Telegram.]

HARTFORD, CONN., April 16, 1908.

Congressman CHAS. E. LITTLEFIELD,  
Washington, D. C.:

We strongly protest against the passage of the Hepburn bill, because of unequal treatment of cooperation and voluntary associations and autocratic power placed in the hands of commissioners.

PRATT & CADY COMPANY,  
A. W. GILBERT, President.

[Telegram.]

NEW BRITAIN, CONN., *April 16, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*Washington, D. C.*

Kill the Hepburn bill. It toadies to labor unionism and gives to the Bureau of Commerce powers of the Spanish inquisition. Kill it.

LANDERS, FRARY & CLARK.

[Telegram.]

ANSONIA, CONN., *April 16, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*Washington, D. C.*

Regarding Hepburn bill we strenuously object to the discrimination in treatment of corporations and voluntary associations and to the autocracy vested in the Commissioner of Corporations.

FARRELL FOUNDRY AND MACHINE CO.

[Telegram.]

WATERBURY, CONN., *April 16, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

Please to record our emphatic protest against Hepburn amendment. Relief afforded too costly in self-respect to justify means proposed.

SCOVILL MANUFACTURING CO.

[Telegram.]

DETROIT, MICH., *April 16, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee House Judiciary Committee,*  
*Washington, D. C.:*

On behalf of 100 of the principal manufacturing industries of this city, we protest against the enactment of section 3 of the Hepburn amendment, H. R. 19745, and petition your honorable committee to report unfavorably thereon.

THE EMPLOYERS' ASSOCIATION OF DETROIT.  
JOHN TRIX, *President.*

[H. Goldwater & Co., manufacturers infants' and children's cloaks.]

NEW YORK, *April 16, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

DEAR SIR: Upon the request of the Merchants' Association of New York, of which we are members, also upon our own conviction, we would like to call your attention to the bill before Congress now, viz, the Hepburn and Warner amendments to the Sherman antitrust law. We would kindly request you to please work and vote against those bills, and also try to have a bill presented to create a commission to prepare suitable amendments. We consider the bill, in fact, worse than the original measure of the Sherman antitrust law, and an untried method, opposed to the spirit of our constitutional system.

Hoping you will pardon us for bringing this matter before you, we are,

Yours, truly,

H. GOLDWATER & CO.

[The Roessler & Hasslacher Chemical Company, manufacturing and importing chemists.]

NEW YORK, April 16, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee Judiciary Committee  
of the House of Representatives.*

SIR: We herewith wish to register our opposition to the Hepburn and Warner amendments to the Sherman antitrust law. We are in favor of the creation of a commission under instruction to investigate a subject which can only be properly framed by carefully analyzing the past development and the operation of the Sherman antitrust law. We therefore ask you to oppose said amendments, believing that their enactment will tend to make matters worse by adding further perplexities and uncertainties to those already existing. We remain,

Respectfully, yours,

THE ROESSLER & HASSLACHER CHEMICAL CO.  
W. A. HAMANN, *Treasurer.*

NEW YORK, April 16, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee Judiciary Committee,  
House of Representatives.*

DEAR SIR: We beg to call your attention to the bill introduced by Mr. Hepburn March 23, 1908, and known as H. R. 19745.

While recognizing the importance of having the Sherman law amended so that justifiable trade combinations having a reasonable and laudable purpose may be sanctioned, we believe such legislation should be undertaken only after the facts developed under the operations of the Sherman law have been fully collated and analyzed.

Therefore we ask your influence against the passage of H. R. 19745, and in favor of the creation of a commission which shall be authorized to investigate the matters at issue and report its conclusions and recommendations at as early a date as feasible.

Thanking you in advance for any attention you can give this request, we remain,

Yours, truly,

J. H. LANE & Co.

NEW YORK, April 16, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee, Judiciary Committee,  
House of Representatives, Washington, D. C.*

DEAR SIR: We wish to record our opposition to the amendments to the Sherman antitrust law of 1890 proposed by Congressman Hepburn.

It is our belief that this measure would make the present situation worse instead of better, and we do not think the legislation ought to be passed.

Yours, truly,

FAULKNER, PAGE & Co.

[Telegram.]

ATLANTA, GA., April 16.

HON. GERRETTE J. DIEKEMA,  
*Judiciary Committee, Washington, D. C.*

We are heartily in favor of Hepburn bill amending antitrust law. Do all in your power to have it passed.

GERMAIN & BOYD LUMBER CO.

NEW YORK, April 16, 1908.

HON. CHARLES LITTLEFIELD,  
*Chairman Subcommittee of Judiciary Committee, Washington.*

SIR: The Hepburn bill and the Warner bill, amendatory of the antitrust act of July 2, 1890, should not be passed as now before Congress. And I beg to urge and request you to propose to your committee to recommend the creation

of a commission to investigate matters at issue; to collect evidence from representatives of industry—labor, commerce, and transportation—report their conclusions, with recommendations for further and better legislation, as early as possible.

I am, dear sir, yours, most respectfully,

AD. ENGLER.

NEW YORK, April 17, 1908.

Mr. LITTLEFIELD,

*Chairman of House Committee on Judiciary, Washington, D. C.*

DEAR SIR: We have read with some surprise the statement made before you by W. J. Schieffelin and others with drug interests here, favoring certain clauses in the Hepburn bill. Before accepting their remarks as representing the sentiment of the drug trade, would respectfully direct your attention to the fact that they, and others of the Metropolitan Club, a local association whose object is to restrict prices and coerce the manufacturers into selling only those who follow their dictates. The independent dealer ought to be deserving of some consideration on your part, and his source of supply not "cut off," as it must be apparent to you is the principal object of the gentlemen who appear before you.

Yours, truly,

E. J. BARRY.

DETROIT, MICH., April 17, 1908.

Hon. CHAS. E. LITTLEFIELD,

*Judiciary Committee, House of Representatives, Washington, D. C.,*

DEAR SIR: We have just wired you as follows:

"On behalf of 100 of the principal manufacturing industries of this city, we protest against the enactment of section 3 of the Hepburn amendment, H. R. 19745, and petition your honorable committee to report unfavorably thereon.

"THE EMPLOYERS' ASSOCIATION OF DETROIT,  
"JOHN TRIX, President."

Fully realizing your tremendous and voluminous correspondence we, of the Employers' Association of Detroit, having implicit faith in the wisdom with which this matter will be treated at your hands, beg to remain,

Very respectfully,

THE EMPLOYERS' ASSOCIATION OF DETROIT,  
JOHN TRIX, President.

NEW YORK, April 17, 1908.

Hon. CHAS. E. LITTLEFIELD,

*Judiciary Committee, House of Representatives, Washington, D. C.*

DEAR SIR: We would earnestly request you to use your best efforts against the Hepburn-Warner amendment to the Sherman antitrust law, and sincerely hope that you will do everything you can to have a commission appointed to prepare suitable amendments.

Respectfully,

SUSQUEHANNA SILK MILLS,  
MAX SIEPERMAN, Secretary.

DETROIT, MICH., April 17, 1908.

Hon. CHARLES E. LITTLEFIELD,

*Chairman Subcommittee of House Judiciary Committee,  
Washington, D. C.*

DEAR SIR: I wish to express my disapproval of H. R. 19745, the Hepburn amendment to the Sherman antitrust act.

It legalizes strikes and boycotts for any cause, as well as other unjust actions, and would be dangerous to employer and employee alike.

I trust you will give this most careful consideration and that the bill will not be passed.

Yours, respectfully,

VINTON COMPANY,  
By G. JAY VINTON,  
President.



[Telegram.]

NEW BRITAIN, CONN., April 17.

Congressman CHARLES E. LITTLEFIELD,  
Washington, D. C.

We earnestly protest against passage of Hepburn bill.

NORTH & JUDGE MANUFACTURING COMPANY.

DETROIT, MICH., April 17, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of House Judiciary Committee,  
Washington, D. C.

DEAR SIR: The following telegram, addressed to you to-day, covers in a nutshell our views relative to the Hepburn bill, H. R. 19845:

"The Builders' Association of Detroit, representing 150 of the leading building contractors of this city, are strongly opposed to section 3 of H. R. 19745, Hepburn bill, disapproving of any provision exempting one particular class."

It is unnecessary for us to elaborate by argument a matter so thoroughly familiar to you, more than to protest against those portions of the bill referred to.

Yours, very respectfully,

THE BUILDERS' ASSOCIATION OF DETROIT.  
J. H. LAURIE, President.

DETROIT, MICH., April 17, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of House Judiciary Committee,  
Washington, D. C.

DEAR SIR: Confirming telegram of even date, the undersigned desire to register their protest against a favorable report by your committee on the Hepburn bill, H. R. 19745, the provisions most particularly meeting our disapproval being contained in that portion of section 3 which reads:

"Nothing in said act approved July second, eighteen hundred and ninety, or in this act, is intended, nor shall any provision thereof hereafter be enforced, so as to interfere with or to restrict any right of employees to strike for any cause or to combine or to contract with each other or with employers for the purpose of peaceably obtaining from employers satisfactory terms for their labor or satisfactory conditions of employment, or so as to interfere with or restrict any right of employers for any cause to discharge all or any of their employees or to combine or contract with each other or with employees for the purpose of peaceably obtaining labor on satisfactory terms."

We trust you will give this most careful consideration and that the committee will make an adverse report.

Respectfully,

MASON CONTRACTORS' ASSOCIATION OF DETROIT,  
GEO. D. NUTT, President.  
JOHN F. PUTNAM, Vice-President.  
WILLIAM H. WHITTINGHAM, Secretary.  
CHAS. N. GOODENOW, Treasurer.

[Telegram.]

GRAND RAPIDS, MICH., April 17.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of Judiciary,  
House of Representatives, Washington, D. C.

Section 3 of House resolution 19745, known as "Hepburn amendment to Sherman Act," is objectionable to the 250 leading contractors in the building trades in Detroit, Ann Arbor, Bay City, Battle Creek, Grand Rapids, Kalamazoo, Mount Clements, Pontiac, Saginaw, Port Huron, and other Michigan cities affiliated with this association, and in their behalf I most emphatically protest against its enactment and solicit an unfavorable report by your committee.

EDWIN OWEN,  
President State Association of Builders.

DETROIT, MICH., April 17, 1908.

MR. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of House Judiciary Committee.

Washington, D. C.

DEAR SIR: Having read H. R. 19745, Hepburn amendment to the Sherman antitrust act, we are not in favor of it as employers. It makes legal strikes and boycotts for any cause, as well as other unjust actions, and would prove dangerous not only to ourselves but to our employees as well.

Kindly give this your careful consideration, and trusting bill will not be passed, we are,

Truly, yours,

WEBER BROTHERS.

---

[The Harry J. Dean Company, designers and decorators.]

DETROIT, MICH., April 17, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of House Judiciary Committee,

Washington, D. C.

DEAR SIR: I wish to express my disapproval of H. R. 19745, the Hepburn amendment to the Sherman antitrust act.

It legalizes strikes and boycotts for any cause, as well as other unjust actions, and would be dangerous to employer and employee alike.

I trust you will give this most careful consideration and that the bill will not be passed.

Yours, respectfully,

THE HARRY J. DEAN COMPANY.

---

[William Wright Company, designers, decorators, and manufacturers.]

DETROIT, April 17, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of House Judiciary Committee,

Washington, D. C.

DEAR SIR: We wish to express our disapproval of H. R. 19745, the Hepburn amendment to the Sherman antitrust act.

It legalizes strikes and boycotts for any cause, as well as other unjust actions, and would be dangerous to employer and employee alike.

We trust you will give this most careful consideration and that it be made part of the printed record, and that the bill will not be passed.

Yours, respectfully,

WILLIAM WRIGHT COMPANY.

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[The James Roach Company, decorators.]

DETROIT, MICH., April 17, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of House Judiciary Committee,

Washington, D. C.

DEAR SIR: I desire to express my disapproval of H. R. 19745, the Hepburn amendment to the Sherman antitrust act.

It legalizes strikes and boycotts on any provocation, as well as other unjust actions, and would be dangerous to employer and employee as well.

Trusting that you will give this due consideration and that the bill will not be passed,

Very respectfully, yours,

JAMES ROACH.

---

HARTFORD, CONN., April 18, 1908.

HON. CHARLES E. LITTLEFIELD,  
Washington, D. C.

DEAR SIR: In connection with the pending legislation known as the Hepburn bill we would ask you to note confirmation of our telegram to you to-day, attached hereto, in which we advised that we believe it is antagonistic and would be prejudicial to the interests of the manufacturers of this country.

We have taken the liberty of asking your opposition to its passage and the use of your influence in Congress to prevent its becoming a law.

Trusting you will pardon us for intruding on your time, but believing that our interpretation of the measure is correct, we beg to remain,  
Yours, very truly,

THE JOHNS PRATT COMPANY.

NEW BRITAIN, CONN., April 18, 1908.

CONGRESSMAN CHARLES E. LITTLEFIELD,  
Washington, D. C.

DEAR SIR: We are very much agitated about the Hepburn amendment to the Sherman Act, and we hope that you will register the name of the Corbin Cabinet Lock Company as one of the prominent manufacturing concerns who are opposed to legislation of the kind proposed.

Yours, truly,

CORBIN CABINET LOCK CO.,  
C. H. BALDWIN,  
Vice-President and Treasurer.

BELLAIRE, OHIO, April 18, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee, Judiciary Committee, Washington, D. C.

DEAR SIR: May we ask you to consider ourselves, and we believe the interests of all the manufacturers of the country, when the Hepburn and Warner amendments to the Sherman antitrust law come up, so that you can have your voice or vote? We know you must consider all parties that you represent as well as our particular selves, but we know that you will be urged from many sides, no doubt, to support these amendments, and we only want to call your special attention to the point that this legislation seems to be opening the way for one-man power to an alarming extent, and this will mean that the commissioner, or whatever the power may be called, who has the decision as to what is reasonable in contracts restraining trade will not be able to properly investigate and will be purposely misled, and his decision is apt to be in favor of the loudest claims, which you realize may often be against the right in the matter. We think the courts should have the decision in such matters and should be guided by carefully prepared rules, so that excitable people can not get a decision by clamor and pressure on the spur of the moment, and such things can only be done by a commission or a committee to prepare such rules carefully and after due examination.

Yours, very truly,

THE ENTERPRISE ENAMEL COMPANY.

[L. J. Callanan, importer of and wholesale and retail dealer in teas, coffees, etc.]

NEW YORK, April 18, 1908.

HON. CHARLES E. LITTLEFIELD.

DEAR SIR: Believing, with many others, that the amendments offered by Messrs. Hepburn and Warner to the Sherman antitrust law are not for the best interests of the country, I respectfully ask you to vote and work against them and to vote for a bill to create a commission which after due deliberation will prepare amendments which will conserve the interests of the entire country.

Yours, respectfully,

L. J. CALLANAN.

DETROIT, April 18, 1908.

HON. CHARLES E. LITTLEFIELD,  
Chairman Subcommittee of House Judicial Committee,  
Washington, D. C.

DEAR SIR: The Hepburn amendment to the Sherman antitrust act (House bill No. 19749) appears to us a most ingenious measure to bring no end of trouble to employers of labor.

Why in the name of common sense should we legalize strikes "for any cause," leaving the way clear for such trouble to be perpetrated regardless of intent or consequence?

It legalizes combinations between employers and employees which are wrong! wrong!! wrong!!!

We hope nothing will be left undone to defeat the measure.

Respectfully, yours,

PENINSULAR PRESS.  
I. H. BENJAMIN.

APRIL 18, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Washington, D. C.:*

DEAR SIR: We have not put ourselves on record as regards the Hepburn amendment which is now under consideration, as the objectionable features seem to us so apparent that no one responsible for the conduct of any business could do otherwise than oppose it. It is in our opinion most unwise legislation to say the least, and will only lead to endless trouble.

Yours, very truly,

THE STANLEY WORKS.  
GEO. P. HART,  
*Vice-President.*

[Telegram.]

HARTFORD, CONN., April 18, 1908.

HON. CHAS. E. LITTLEFIELD,  
*Washington, D. C.:*

Hepburn bill antagonistic to manufacturers. Trust you will oppose strenuously.

JOHNS PRATT CO.

[The C. W. Robinson Lumber Company.]

NEW ORLEANS, LA., April 18, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Washington, D. C.*

DEAR SIR: I trust that you will pardon an entire stranger addressing to you a few lines urging that prompt and favorable action be taken by the Judiciary Committee of the House of Representatives on House bill No. 19745, introduced by Mr. Hepburn.

I beg to assure you that the lumber industry of the Southern States is in a deplorable condition. A number of mills have gone into the hands of receivers and others are in financial difficulties and may soon be forced into bankruptcy.

The misery of the situation is that large operators, owning from three to twenty mills each, can not, in the face of the Sherman Act, by a combination shut down their mills for the purpose of limiting production until such time as the demand for lumber shall suffice to increase the price, so that there will be a profit in the manufacture of same.

I know whereof I speak when I say that there is not a mill in the Southern States manufacturing yellow-pine lumber that is coming or can hope to come out even at the present prices, if they count their stumpage at its intrinsic value of from \$3 to \$4 per thousand feet B. M.

Trusting that you will pardon this letter, and hoping you will give it your favorable and careful consideration, I am,

Yours, sincerely,

C. W. ROBINSON.

[Telegram.]

BRIDGEPORT, CONN., April 20, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Hamilton House, Washington, D. C.:*

We register our protest against passage of Hepburn bill, believing it to be detrimental to our interests.

BULLARD MACH. TOOL CO.

[Telegram.]

HARTFORD, CONN., *April 20, 1908.*

CONGRESSMAN CHARLES E. LITTLEFIELD,  
*Washington, D. C.:*

Please note our earnest protest against passage of Hepburn bill. We object to unequal treatment of corporations and voluntary association, and to autocratic power of corporation commissioners.

BILLINGS &amp; SPENCER CO.

[Telegram.]

BRIDGEPORT, CONN., *April 20, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*Chairman House Judiciary Committee, Washington, D. C.:*

We strongly protest against the favorable report from your committee on the Hepburn amendment to the Sherman antitrust law.

AMERICAN AND BRITISH MFG. CO.

[Telegram.]

BRIDGEPORT, CONN., *April 20, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*Chairman House Judiciary Committee, Washington, D. C.:*

We believe that it would be detrimental to report favorably on the Hepburn amendment to the Sherman antitrust law. We trust you will not do so. We believe this amendment would be a great damage to all manufacturers.

BRIDGEPORT BRASS CO.  
 F. J. KINSBURY, JR., *President.*

BRIDGEPORT, CONN., *April 20, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

DEAR SIR: I beg to confirm my wire to you of this morning, reading as follows:

"Please enter our protest against the Hepburn bill. We consider it inimical to our own interests and those of the other manufacturers of Bridgeport."

Trusting you will use your influence to defeat this measure, we are,

Very truly, yours,

THE LOCOMOBILE COMPANY OF AMERICA,  
 S. T. DAVIS, JR., *President.*

[Telegram.]

NEW YORK, *April 21, 1908.*

HON. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

Am decidedly opposed to Hepburn and Warner amendments to Sherman anti-trust law. Urge you to work and vote against same in favor of creation of commissioners.

DE FOREST GRANT.

WASHINGTON, D. C., *April 21, 1908.*

MR. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

MY DEAR MR. LITTLEFIELD: In examining the Hepburn bill (H. R. 19745) I would respectfully submit for your consideration the following suggested amendments to said bill:

We think section 10 should be amended by requiring the Commissioner of Corporations, before declaring the contract filed as an unreasonable restraint of trade, to give a hearing to the road filing said contract, after reasonable

notice; and, secondly, a further provision should be made in said bill authorizing a review of that decision by a proceeding in equity, should the Commissioner of Corporations decide the contract to be an unreasonable restraint of trade.

Section 9 should be amended by providing that the regulations prescribed should be "reasonable regulations."

Section 8 should be amended so that the cancellation of registration should not be revoked until after full hearing. The section provides for notice before revocation, but not for hearing.

We think the eleventh section of the bill should be amended so as to prevent any prosecutions on contracts resulting in a reasonable restraint of trade, and not leave the question as it exists to-day in the Sherman law under the decision of the Supreme Court in the case of the United States v. The Trans-Missouri Freight Association (166 U. S., 340), which altered the common-law rule, and which decision was followed in the case of the United States v. Joint Traffic Association (171 U. S., 505).

In the first case cited you will remember the court was divided, five to four, and Mr. Justice Brewer was one of the judges who concurred in the majority opinion. But in the case of Northern Securities Company v. United States (193 U. S., 260), although Mr. Justice Brewer concurred with the majority in that case in affirming the judgment below, in his concurring opinion he used the following significant language:

"Instead of holding that the antitrust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. Whenever a departure from common-law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended."

This quotation clearly indicates that if Mr. Justice Brewer concurred in the language of the decision in 166 United States, upon more mature reflection he has changed his opinion. We think it would be very unwise to reaffirm the decision in 166 as to reasonable restraint of trade, as this statute does.

Very truly, yours,

CHAS. J. FAULKNER.

[Erlanger Brothers, underwear.]

NEW YORK, April 21, 1908.

HON. CHARLES E. LITTLEFIELD,

Washington, D. C.

DEAR SIR: We would appreciate it if you will use your influence to see that a commission is appointed to prepare suitable amendments to the Sherman antitrust law, conformable with the requirements of the present needs of business.

We kindly ask you to work and vote against the Hepburn and Warner amendments, as we do not believe they will accomplish what is desired.

Yours, very truly,

ERLANGER BROTHERS.

[Telegram.]

BRIDGEPORT, CONN., April 21, 1908.

HON. CHAS. E. LITTLEFIELD, M. C.,

Washington, D. C.:

Undersigned being fifty largest manufacturers of Bridgeport declare that proposed Hepburn amendment Sherman antitrust law will wreck country's manufacturing business. Please protest its favorable report.

MANUFACTURERS' ASSOCIATION OF THE CITY OF BRIDGEPORT.

NEW YORK, April 23, 1908.

HON. CHARLES E. LITTLEFIELD,  
*Chairman Subcommittee, Judiciary Committee,*  
*House of Representatives.*

DEAR SIR: With the welfare of general business only in mind, we would respectfully request that you work and vote against the Hepburn and Warner amendments to the Sherman antitrust law, and that you use your influence and that of your committee toward the creation of a commission to prepare suitable amendments.

Yours, respectfully,

CARSON PIRIE SCOTT &amp; Co.

[New England Shoe and Leather Association.]

BOSTON, MASS., April 24, 1908.

HON. CHARLES E. LITTLEFIELD, M. C.,  
*Washington, D. C.*

DEAR SIR: The New England Shoe and Leather Association, representing a large proportion of the leading shoe and leather manufacturers and collateral interests in New England is unalterably opposed to the provisions of H. R. bill 19745, commonly known as the Hepburn bill, providing for amendments to the so-called Sherman antitrust act, and earnestly protest against the passage of the said bill.

Respectfully, yours,

GEO. C. HOUGHTON, *Secretary.*

DULUTH, April 24, 1908.

HON. JOHN J. JENKINS,  
*Chairman Judiciary Committee, House of Representatives.*

DEAR SIR: At a meeting of the executive committee of the Citizens' Association of Duluth, which is an organization made up from the Commercial Club, with its 1,000 members; the Real Estate Exchange, with its membership of more than 100 firms; the Builders' Exchange, with its more than 100 firms, and from an advisory committee of 100 leading citizens, prominent in commercial and financial circles of this city, the following was adopted and ordered sent to you as chairman of the Judiciary Committee of the National House of Representatives:

"We protest against the passage of the so-called Hepburn amendment to the Sherman antitrust act. This amendment is now before the Judiciary Committee of the House of Representatives for discussion and recommendation. By this amendment, in somewhat veiled language, the boycott is legalized, the black list and the sympathetic strike will be so entrenched that the rights of the vast majority of the people will be seriously injured. It proposes to exempt labor organizations—having no capital and conducted for no profit—from the provisions of the antitrust act. No reasonable man will say that there should be no restraints that interfere with the free flow of interstate commerce; nor can any man say that the capacity of a combination to interfere with trade rests upon its possession of capital stock, or upon the fact that it is organized for profit or not. Too many instances proving the contrary can be readily adduced by anyone conversant with the conditions that have existed prior to and during strike periods. Nor can any man say that, in the protection of intercourse between States and communities, there should be any distinction on account of its class, between any forms of combinations that do interfere with full and free flow of traffic. Nor will anyone deny the fact that there has been growing up in the past years a wall of restraint of trade by the labor unions, without capital stock or operations conducted for profit.

"If there are to be amendments to the Sherman Act, they should be the result of careful scrutiny of the act as a whole, and they should be adopted after mature and deliberate consultation. They should be, in our opinion, in the nature of a general revision, if needed, and not as a patchwork, placed to cover certain specific situations, the necessity of a change in which is, to say the least, a subject for argument."

Very respectfully, yours,

A. H. COMSTOCK,  
*Chairman.*  
 DWIGHT E. WOODBRIDGE,  
*Secretary.*

[Fred A. Vanderveer, contractor and builder.]

GRAND RAPIDS, MICH., April 25, 1908.

HON. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

DEAR SIR: We earnestly hope for the defeat of the Hepburn amendment to the Sherman antitrust act and urgently request your cooperation in the defeat of same.

Yours, very respectfully,

FRED. A. VANDERVEER.

[National Slack Cooperage Manufacturers' Association.]

BEARDSTOWN, ILL., April 27, 1908.

HON. JOHN J. JENKINS, M. C.,  
*House of Representatives, Washington, D. C.*

DEAR SIR: Representing the National Slack Cooperage Manufacturers' Association, I desire in behalf of this industry to enter my earnest protest on the proposed antitrust act, limiting injunctions in labor disputes.

This legislation seemingly favoring labor organizations, but in reality forming or assisting in forming labor combinations and labor trusts. This great industry, the slack-barrel package interests, can be found in every section of our country, and claims that one of the best features of our legal system is the protection of the weak from the strong and appeals to you and your co-workers to let the common right which has existed for centuries of applying to the courts for the restraint of unlawful acts stand without being limited, and therefore begs to have you do what you can to defeat the movement to place on the statute books the law limiting restraining orders.

I am, sir, with respect, yours, truly,

H. M. SCHMOLDT, *President.*

[Telegram.]

SAN FRANCISCO, CAL., April 27, 1908.

HON. CHAS. E. LITTLEFIELD,  
*Chairman, Washington, D. C.*

The Merchants' Association of San Francisco requests that you earnestly oppose the Hepburn-Warner amendments to the Sherman antitrust bill, and urges the appointment of a commission to investigate and submit complete report before action.

THE MERCHANTS' ASSOCIATION OF SAN FRANCISCO,  
FRANK J. SYMMES, *President.*

MILWAUKEE, WIS., April 28, 1908.

HON. CHARLES E. LITTLEFIELD,  
*House of Representatives, Washington, D. C.*

DEAR SIR: Our attention has been called to what is known as the Hepburn and Warner amendments to the Sherman antitrust law, and we are firmly of the opinion that these amendments will work to the detriment of the commercial interests of the United States.

While recognizing that those who are responsible for the drafting of the proposed Hepburn amendments to the Sherman antitrust law are actuated by a sincere purpose to modify and improve that law, and to promote the public weal, we believe that the proposed measure, if enacted into law, instead of helping the present situation, would make it still worse by introducing further perplexities, uncertainties, and untried methods opposed to the spirit of our constitutional system and the past usages of our people.

For this reason we would kindly ask that you vote against the amendments mentioned above and that you favor a bill to create a commission to prepare



suitable amendments. Such a commission could carefully and deliberately consider the subject in all its phases, and could no doubt recommend an amendment which would be for the welfare of the country.

We sincerely trust you will give this due consideration.

Yours, truly,

NATIONAL ENAMELING AND STAMPING CO.,  
EDW. H. SCHWARTZBURG,  
*Assistant Manager.*

DETROIT, April 28, 1908.

MY DEAR SIR: I feel it my duty as a manufacturer and an American citizen to give you briefly my opinion of House bill No. 19745, commonly known as the Hepburn amendment to the Sherman antitrust law.

I think this is the most dangerous bill ever brought before any body. It is far-reaching. If we can not have something that will improve the Sherman antitrust law, for heaven sake do not let us have anything that will make it worse.

I believe you have given this careful consideration, and can not but think you will conclude it is a dangerous bill to have become a law, and I hope you will not only vote against it yourself, but use your influence toward its defeat.

Thanking you in advance for the consideration you give to this letter, believe me, with very best regards.

Truly, yours,

GEORGE H. BARBOUR.

NEW YORK, April 28, 1908.

DEAR MR. LITTLEFIELD: I have received from the Illinois Manufacturers' Association a letter, of which I hand you herewith a copy, in which various suggestions are made for the improvement of the pending Hepburn bill.

I am glad to send these suggestions to you; for, as you know, the object of the National Civic Federation is to get the best possible bill, and not to urge its own measure as though that were not capable of improvement. If you see no objection, I think it would be an advantage if this letter, or so much of it as you think proper, could be incorporated in the minutes of the hearings.

I take pleasure in assuring you again of our very high appreciation of the great courtesy and patience which you have shown in the consideration of this measure. I hope you feel, as I do, that the record of the hearings will have very great value as bringing out the precise difficulties which are involved in any attempt to legislate upon this subject.

Yours, sincerely,

SETH LOW,

*President of the National Civic Federation.*

HON. CHARLES E. LITTLEFIELD, *Chairman, etc.*

APRIL 24, 1908.

HON. SETH LOW,

*President National Civic Federation, New York City, N. Y.*

DEAR SIR: The directors of the Illinois Manufacturers' Association in suggesting changes to the Hepburn bill, which proposes to amend "the act to protect trade and commerce against unlawful restraints and monopolies," pending in Congress, prefer their views should be conveyed informally rather than to offer specific amendments. They submit the following for your consideration, hoping it will meet with your approval and that the features mentioned can and will be incorporated in the measure.

Section 8 should be amended to provide that any person, firm, corporation, or association may register with the Interstate Commerce Commission and receive the benefits of the proposed law. The application for business corporations for registration should not require anything more stringent or inquisitorial than is provided for corporations and associations not for profit and should be accompanied only by a written statement setting forth the charter and by-laws of the corporation, the place of its principal office, and the names of the officers and directors and their residences. There should not be discrimination between business corporations and corporations not for profit, nor should greater restrictions be put upon business corporations than upon railway corporations. All interests should be treated exactly alike, regardless of the

object of the corporation. Restraints of trade by any such registered corporation upon complaint by responsible persons furnishing reasonable proof of such restraint should be investigated by the Commission in a manner similar to that required in the case of railways in section 13 of the act of June 29, 1906.

Section 9 should be eliminated and section 10 amended to conform to section 8 and so amended that a party to a combination or contract aggrieved by the entry of an order finding same unreasonable may appeal to the circuit court of the United States from the decision of the Interstate Commerce Commission. In case the court holds that the combination or agreement is reasonable, no prosecution, suit, or proceeding by the United States should lie.

As to section 4, it should provide that after the passage of the act no State should prosecute, either criminally or civilly, any person, firm, corporation, or association on account of any combination, contract, or act if such combination or contract shall have been filed in accordance with the provisions of the law and if the acts performed were in connection with interstate commerce. No person, firm, corporation, or association should be deprived or abridged of its or their rights or privileges on account of having availed itself or themselves of the privileges of the law. We are aware that this suggestion opens up a broad field for inquiry, but if Congress has the power to control interstate commerce and will exercise it in this manner the benefit to the country will be incalculable.

Nothing in the act approved July 2, 1890, or in this act is intended, nor shall any provision hereafter be enforced, so as to interfere with or restrict any right of employees to make agreements among themselves or with their employers as to wages, labor conditions, or working hours, or so as to interfere or restrict any right of employers for any cause to discharge any or all of their employees, or to make agreements with their employees or associations of their employees or with employers or others on questions relating to wages, labor conditions, or working hours.

The directors fully realize the difficulties which confront you in your efforts to harmonize the various interests and want to use the influence of this association for the general good and accomplish that which will be best for our country. Your view of the campaign in behalf of this proposed law is broader than ours on account of your close connection with it, consequently obstacles which confront you may not be apparent to us. We assure you, however, of our good will. We will be pleased to receive any amendments which have been offered since the meeting in Washington last week.

Yours, very truly,

\_\_\_\_\_, *President.*

[Telegram.]

DETROIT, MICH., *May 2.*

Hon. JOHN J. JENKINS,  
*House of Representatives, Washington, D. C.*

We protest against passage of any anti-injunction measure at this time. Such action should be taken only after due consideration of great principles involved and should not be rushed through as political measure. The party responsible for such legislation will be swamped at the polls.

W. H. HOYT,  
*Vice-President Great Lakes Engine Works.*

[Telegram.]

PITTSBURG, PA., *May 2.*

Hon. JOHN J. JENKINS,  
*Chairman House Judiciary Committee,  
House of Representatives, Washington, D. C.*

Kindly use your influence against two anti-injunction bills which are about to be reported from committee.

MESTA MACHINE COMPANY,  
Per C. J. MESTA.

[Telegram.]

NEW BRITAIN, CONN., May 2.

Hon. JOHN J. JENKINS,

*Chairman Judiciary Committee, Washington, D. C.:*

We earnestly protest against any anti-injunction legislation at this time.

P. CORBIN,

*President American Hardware Corporation.*

[Telegram.]

NEW BRITAIN, CONN., May 2.

Hon. JOHN J. JENKINS, *Washington, D. C.:*

Would cut out and forget any and all anti-injunction legislation.

H. S. HART.

[Telegram.]

NEW BRITAIN, CONN., May 2.

Hon. JOHN J. JENKINS,

*Chairman Judiciary Committee, Washington, D. C.:*

Any anti-injunction legislation at this time particularly obnoxious to manufacturers.

P. &amp; F. CORBIN,

CHAS. H. PARSONS, *President.*

[Telegram.]

BRIDGEPORT, CONN., May 2.

Hon. J. JENKINS,

*House of Representatives, Washington, D. C.:*

We are opposed to any anti-injunction legislation this year. Please enter our vigorous and unalterable protest against favorable consideration of it.

LOCOMOBILE COMPANY OF AMERICA,  
S. T. DAVIS, Jr., *President.*

[Telegram.]

BROOKLYN, N. Y., May 4.

Representative CHAS. E. LITTLEFIELD,

*Washington, D. C.:*

We are strongly opposed to the anti-injunction bill and any amendment to Sherman antitrust act.

GREENPOINT METALLIC BED COMPANY.

## STATEMENT OF MR. JAMES A. EMERY.

Mr. EMERY. Mr. Chairman, I represent, in opposition to the proposed measure, about 130 national, State, and local associations of an industrial and commercial character, including in their membership manufacturers, merchants, professional men, all types of labor, and practically all the commercial and mercantile callings. I will supply a list of these associations to the committee, and I think I may state that these associations, in connection with those which are on record before this committee in opposition to the bill, represent,

substantially, 60 per cent at least of the manufacturing industries of the United States, from \$8,000,000,000 to \$10,000,000,000 invested in manufacturing industries and employ probably 2,500,000 men.

Mr. LITTLEFIELD. I will state right here for the information of Mr. Low that I have quite a large number of protests and some requests for the passage of the bill, and I will print all of those at the end of the hearings, so that they will not be mixed in with anything else.

Mr. EMERY. In addition to these specific protests here made, I desire to add that of the National Association of Automobile manufacturers.

Mr. Chairman, I desire to have the record of a previous hearing, at which Mr. Gompers, president of the American Federation of Labor, was heard, corrected in this. It there appears that he made certain statements of a general character, but so specialized as to be of reference to myself and others in that we opposed all matters before legislative committees of Congress in which organized labor was interested or those which it proposed and urged, and that, further, some one at that time interrupted and said, "Amen," and that an error was made in assuming that it was I who said "Amen" to that proposition. I did not, the remark being made by Mr. Fuller, of the Locomotive Engineers, who was sitting beside me. Mr. Gompers then made some further remarks, restating the same proposition and saying that I assented to the proposition by saying "Amen." To this I object. The further remarks which Mr. Gompers made on the discovery of his error are not inserted in the record. I therefore ask that that portion of the record which contains Mr. Gompers's statement concerning myself immediately following my alleged use of the word "amen" be stricken out of the record as being founded on a misconception of facts.

Mr. LITTLEFIELD. Mr. Emery, I do not know whether I could go quite as far as that, because, in the first place, it is in the absence of Mr. Gompers, and I suppose, strictly speaking, that is a matter that the attention ought to have been called to at the time; the attention should have been called to it on the spot.

Mr. EMERY. I endeavored to do so.

Mr. LITTLEFIELD. I remember that you did. My recollection is quite clear that you tried to make the correction, but Mr. Gompers would not be interrupted. I am rather inclined to think that this explanation you have made perhaps clears the matter up quite fully. Of course, if I should go so far as to eliminate a portion of his remarks, Mr. Gompers might think I struck something out that had an effect upon the context.

Mr. EMERY. I will ask, if Mr. Gompers agrees, that it be stricken out.

Mr. LITTLEFIELD. Whatever arrangement you make with him will be agreeable.

Mr. EMERY. The discussion of the Hepburn bill we have just heard is, perhaps, the first legal explanation of its purposes that has been given. I say this, not to throw any discredit upon Mr. Low or Professor Jenks's statement with reference to the legal provisions of the bill, but inasmuch as it has been referred to the advisory legal body of the House, it would be assumed that the specific legal meaning of the provisions of the proposed amendment would be stated and de-

fined from the standpoint of a lawyer; and as that had not been done to any extent until Mr. Smith's statement here this morning—that is, from the standpoint of the proponents of the measure—I do not desire at this time to attempt to discuss it.

The chairman knows that there is pending before this committee not merely the Hepburn bill, which has been the immediate subject of our discussion, but various proposed amendments to the Sherman antitrust act, none of which, with one exception—I should say two exceptions—have been argued before this subcommittee. There has been specifically proposed to this committee, in addition to the amendments offered by Mr. Low, an amendment known as the "Wilson bill," which sets forth those changes in the bill desired and urged by the American Federation of Labor and its allied associations, through Mr. Gompers, and certain other amendments specifically exempting agricultural and labor combinations from the operations of the act, commonly known as the "Hughes bill," being the measure proposed by Representative Hughes, of New Jersey, who had a hearing before the chairman of this subcommittee.

I shall take the time of the committee for a few moments to call special attention to these proposed amendments, for the reason that they are based upon what I believe to be a misconception of the intent of the law—a misconception of the judicial interpretation of the law—a misconception of the facts which surround the birth of the Sherman Act.

Mr. DAVENPORT. I will remind you in that connection that the Pearre bill touches upon this matter in its legalization of certain conspiracies. These matters are covered by several bills, I think, pending before Congress.

Mr. LITTLEFIELD. But those matters are not pending here as concrete principles. Mr. Emery is confining himself to proposed amendments to the bill now pending before the subcommittee. There are a lot of other bills now pending before this subcommittee. As I understand, Mr. Emery was addressing himself to this particular bill on account of the fact it was proposed in this bill to amend the provisions of the one now pending before the committee.

Mr. EMERY. I spoke of the Wilson bill especially, because it was the subject of discussion before this committee, an amendment without which Mr. Gompers said he could not support the pending measure.

Mr. LITTLEFIELD. I understand he proposes to offer that.

Mr. EMERY. I have alluded to the measure of Representative Hughes, Mr. Chairman, because it seems to me that the Sherman Act has been very unhappily treated in the course of this discussion, and has received a very considerable amount of criticism from various sources which do not justly apply to it. The ground for amending it has been stated to be that it was unwise, that it was hasty, that it was improvident, that it was based upon a misunderstanding or a misconception of the facts complained of and of the law applicable to the problem, that it is a piece of legislation not deserving a very serious respect. It was not asserted by Mr. Towne the other day, but it was with sharp reference to that act that he did state that much of past law with regard to combinations had been made at a time before the existing industrial circumstances had been developed, and when the vast combinations in every department of commercial life in our country did not exist. That can not be said of the Sherman Act. The

facts of combination have not so greatly changed from 1890 to this date. It can not be said of them that they were not well known, did not operate, and did not offer the same evils which are now being discussed. Present combinations differ from them chiefly in degree, if at all, and not in kind.

Mr. LITTLEFIELD. That is, your proposition is they were then characterized by the same conditions that obtain to-day?

Mr. EMERY. Practically the same conditions. There is very evident misunderstanding, Mr. Chairman, of the genesis of the Sherman Act. It is evidenced by the nation-wide public criticism that has been directed against it by the proponents of the Wilson bill who believe the Sherman Act unfairly, unjustly, and improperly operates against what they are pleased to call their lawful activities of labor combinations. Mr. Hughes, of New Jersey—and I should naturally assume that if a Member of Congress was grossly in error concerning the conditions under which the act came into existence it could be assumed that the average citizen could be excused for sharing the same delusions—Mr. Hughes in a statement made on March 14, 1908, to the chairman of this subcommittee, in urging favorable consideration of the Hughes bill, a measure exempting agricultural and labor combinations from the operation of the act, began his statement by saying:

I have made careful examination of the debates in the Senate and in the House at the time of the passage of this act, and I find that none of the Senators, so far as they expressed themselves, had any idea that the legislation then passed could be construed to apply to labor organizations or labor unions.

He does not say "was intended;" he says "could be construed." It is not necessary to directly refute this by an appeal to other documents, because the gentleman contradicted himself in the same discussion where he produced several statements of Senators which showed that they did fear and did assert and did hold, as a matter of legal interpretation, that the bill then before them for consideration not only could but did actually apply to organizations of labor. The statement was further made by the gentleman on another point that when the bill which is now the Sherman Act came out of the Judiciary Committee that all the amendments proposed had been taken off, "and it was in practically the same shape. I will say, as it was when Senator Sherman first presented it, although I must say that it has been so difficult to get hold of the original documents that I do not want to say that as a matter of fact." He states later that when the bill was presented to the House it was passed very hurriedly, and he continues:

My only object in citing Mr. Cannon's statement being to show that the bill went through the House hurriedly, I think in about an hour's time, and that so far as the debate discloses nobody knew very much about the provisions of the bill.

I want further to notice the fact that Representative Hughes later said he did not think the United States Supreme Court, when it passed on the Loewe case, was informed as to what took place during the Congressional debates upon the Sherman Act.

Mr. Gompers, in an argument made before this committee on the 14th of February, 1908, had this to say concerning the purposes which the legislators who framed the Sherman Act had in mind:

The most conservative of the organizations are declared to be organizations contemplated by the Sherman antitrust law, whereas, as a matter of fact,

every man who now lives and is familiar with the legislation of the day knows that that was never intended; that the Sherman antitrust law was never intended to include and to apply to the organizations of labor. It was my good fortune at the time to have the respect and confidence of quite a number of men in public life. I had the respect and confidence of Senator Sherman, of Senator Henry W. Blair, of New Hampshire; of Senator George, of Mississippi, and of Senator Hoar, of Massachusetts, and of a number of other gentlemen, members of the Senate, and others, Members of the House; and it was my privilege to be in frequent conference with these gentlemen when this bill was in its formative state. A few men, among them myself, urged upon Senator George, of Mississippi, the adopting of an amendment that should by express terms exclude the organizations of labor from the operations of the Sherman antitrust bill.

Mr. Gompers further states, and this is exceedingly important in view of the statements made with regard to the unfairness of existing constructions:

From the enactment of that law until 1900 labor had very many experiences with the courts, and our views were fully carried out. I remember that the House Judiciary Committee in that year proposed an amendment, an amended bill, a bill amendatory of the Sherman antitrust law. I know, too, that we asked a number of the members of this committee to accept an amendment to our bill excluding the labor organizations from the operations of the antitrust law. We were told by at least one gentleman, a member of the Judiciary Committee, that our fears were unfounded; that the amendment was unnecessary; that neither under the Sherman antitrust law, nor under the bill amendatory of that law by the committee, could the labor organizations be brought under its operation, and that we were simply building up a dummy man, a straw man, in order that he might be thrown down. However, you know that the House adopted the amendment which we suggested, and which was proposed on the law by Mr. Tyner.

If it were not for taking up so much of your time, I would like to proceed longer on this, but I realize that you gentlemen must attend to your other duties, and I will say this, Mr. Chairman and gentlemen, that I remember that a number of my colleagues and myself talking to Mr. Littlefield, who was then, as now, a member of the Judiciary Committee, he pooh-poohed the idea that this amendment was necessary.

Mr. LITTLEFIELD. I beg your pardon, what is that statement?

Mr. GOMPERS. I say that you pooh-poohed the idea that an amendment of the character suggested by us was necessary.

Mr. LITTLEFIELD. I never took the ground that anybody was not subject to this antitrust act. I have always taken the other ground.

Mr. GOMPERS. My contention was to the effect that the law had said that it did not cover all—

Mr. LITTLEFIELD. And I answered that it covered all agreements entered into by everyone. You must be mistaken about that.

Mr. GOMPERS. If I am mistaken, there were at least half a dozen other men at the same time who were just as much mistaken as I was.

Mr. LITTLEFIELD. They certainly labored under an error. I discussed it with Mr. Fuller more than anybody else, and I never assented to the proposition.

I called attention to that particular conversation, Mr. Chairman, and while it belongs to the end of my argument, I call attention to it, because, to say the least, the assertion that anyone did say or could say, whether the chairman of this committee or anyone else, that the act did not apply to organizations of labor, when during the previous ten years the courts had constantly declared that it did, would be absurd. To assert that in 1900 anybody could say that the bill could not be applied, and was not intended to apply, to labor organizations, when the courts of the United States had frequently interpreted it to so apply, is too absurd to require answer. But I am especially concerned to assert that, as a matter of record, it was the

intention of the framers of the Sherman antitrust act not to exclude labor organizations from its operation; that the attempt to so exclude them was distinctly rejected, and that upon the floor of the Senate its leading members not only declared that it ought to apply to organizations of labor, but the distinguished chairman of the Judiciary Committee, one of the most distinguished lawyers who ever sat in the Senate of the United States, fully debated the proposal to exempt labor organizations from the operation of the Sherman Act at the only time that was before the Senate for debate, and while it is true the Senate agreed, in Committee of the Whole, to an amendment which did except labor organizations, the Senate as a body never did accept or agree to the amendment, and it avails nothing to say that they would have done so.

It is a fact that other amendments which were distinctly rejected by Mr. Sherman were accepted in the Committee of the Whole, and the amendment now under discussion never was accepted, and the bill was then referred to the Judiciary Committee under a motion to report it within twenty days. It was referred on the 27th day of March, 1890, and reported back by the Judiciary Committee on April 2, 1890, with the proposal that the original bill be struck out and that the bill which is now the Sherman antitrust act be accepted as an amendment.

Mr. JENKS. That is, they substituted the law as it stands to-day, word for word.

Mr. EMERY. Absolutely.

Mr. JENKS. For what had previously been pending before the Judiciary Committee as a proposed antitrust law.

Mr. EMERY. I refer to it as an amendment. It was really offered, not as an amendment, but as a substitute. What I want to call attention to is the confusion in the minds of Mr. Gompers and Mr. Hughes and most of the gentlemen who discuss this proposition and continuously refer to the original Sherman bill as though it was the act of to-day. There is absolutely no resemblance between the original measure introduced by Senator Sherman on August 14, 1888, and the law in existence to-day; and I desire to call the attention of the committee to the successive steps which marked the progress of the bill from the time of its introduction to the time of the passage of what is now the Sherman antitrust act, on July 2, 1890.

The original bill of Senator Sherman was introduced in the Fiftieth Congress on the 14th of August, 1888, and is an exceedingly short bill; and as it is of great importance to make the comparison very clear, I wish to ask that it be inserted in the record. It reads as follows—this is Senate bill 3445, Fiftieth Congress, first session, and it reads:

A bill to declare unlawful trusts and combinations in restraint of trade and production.

That last word is important, Mr. Chairman, because it illustrates the whole theory on which the bill was framed. It reads:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition in the production, manufacture, or sale of articles of domestic growth or production, or of the sale of articles*



imported into the United States, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance the cost to the consumer of any of such articles, are hereby declared to be against public policy, unlawful, and void; and any person or corporation injured or damaged by such arrangement, contract, agreement, trust, or corporation may sue for and recover in any court of the United States of competent jurisdiction double the amount of damages suffered by such person or corporation. And any corporation doing business within the United States that acts or takes part in any such arrangement, contract, agreement, trust, or corporation shall forfeit its corporate franchise; and it shall be the duty of the district attorney of the United States of the district in which such corporation exists or does business to institute the proper proceedings to enforce such forfeiture.

That bill was referred to the Committee on Finance, and was by them held under consideration until September 11, 1888, and then reported with an amendment. It was again debated, again referred to the Committee on Finance, and again reported on the 25th of January, 1889. I do not think I will cumber the record with these three bills.

Mr. LITTLEFIELD. Perhaps you may be able to state in a general way their purport.

Mr. EMERY. It is not so important that these three bills should be included. But let me state that these are the bills introduced by Senator Sherman on the subject of trusts in the Fiftieth Congress. None of them ever became a law. At the conclusion of the debate on January 28, 1889, they were never again called up. But on December 4, 1889—

Mr. LITTLEFIELD. That is the first day of the first session of the Fifty-first Congress.

Mr. EMERY. The first day of the first session of the Fifty-first Congress.

Mr. LITTLEFIELD. And it was the first bill introduced.

Mr. EMERY. Senator Sherman introduced Senate bill No. 1. This is the only bill that can properly be connected in any way with the existing law. I will read it, if the chairman will permit me. It is as follows:

A BILL To declare unlawful trusts and combinations in restraint of trade and production.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, or which shall be transported from one State or Territory to another, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void.

SEC. 2. That any person or corporation injured or damaged by such arrangement, contract, agreement, trust, or combination may sue for and recover, in any court of the United States of competent jurisdiction, of any person or corporation a party to a combination described in the first section of this act, the full consideration or sum paid by him for any goods, wares, and merchandise included in or advanced in price by said combination.

SEC. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination described in section one of this act, either on his

own account or as agent or attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a high misdemeanor, and on conviction thereof in any district or circuit court of the United States shall be subject to a fine of not more than ten thousand dollars or to imprisonment in the penitentiary for a term of not more than five years, or to both such fine and imprisonment, in the discretion of the court. And it shall be the duty of the district attorney of the United States of the district in which such persons reside to institute the proper proceedings to enforce the provisions of this act.

This bill was referred to the Finance Committee of the Senate and was reported on January 14, with amendments, and was debated, returned to the committee, amended, and again debated.

Mr. LITTLEFIELD. Was Senator Ingalls's stock-gambling section on it then?

Mr. EMERY. That does not come in until later. The bill was again presented in the Senate on March 18, 1890. While it is not important to this discussion to elaborate the objections made to this bill, it should be stated generally that it illustrates the growth of opinion in the Senate as the debate proceeded. In the first bill jurisdiction was claimed to be absolute, plenary, and original on the subject-matter of the bill, quite outside of and independent of the commerce clause of the Constitution. In the four subsequent bills the committee undertook to get jurisdiction over the subject-matter under the commerce clause of the Constitution, but objection after objection was made in the course of the exceedingly sharp debate that followed; one change after another was suggested, and a variety of amendments were discussed, added to, and rejected from these last bills. Finally a bill was presented to the Senate on the 18th of March, 1890, in which they endeavored to get jurisdiction of the subject-matter on the theory that because the United States courts had jurisdiction over controversies between the citizens of different States and between citizens of the United States and foreign countries, the Constitution had granted to Congress the legislative power to regulate the transactions between citizens of different States and between citizens of the United States and foreign countries.

Mr. LITTLEFIELD. That was not Senator Spooner's contention, was it?

Mr. EMERY. No; this is Senator Sherman's—a complete bill.

Mr. LITTLEFIELD. Senator Spooner's proposition related to service of processes.

Mr. EMERY. Yes; it came in later. It should be said that out of the bill introduced by Senator Sherman on the 4th day of December, 1889, came the various amendments; on it and its amendments all the discussion was predicated; out of it originated the bill which, with all its amendments, as a matter of parliamentary law went into the Judiciary Committee on the 27th of March, 1890, and that original bill was amended by what we now know as, and what is, the Sherman Act.

Mr. LITTLEFIELD. I suppose really the Sherman Act was reported as a substitute.

Mr. EMERY. In the parliamentary language used by the Judiciary Committee it is called an "amendment." They say "strike out all after the enacting clause, sections 1 and 2, and print the part in italics."

Mr. LITTLEFIELD. As a matter of parliamentary law it probably was an amendment, but strictly speaking it is a substitute.

Mr. EMERY. Yes. The bill as amended—or, rather, the bill presented—on March 18, 1890, was discussed for a number of days in the Senate and numerous amendments were added, and it was amended in the Committee of the Whole on March 25, by the adoption of the Reagan, Ingalls, and Coke amendments. Other amendments in the Committee of the Whole were adopted on March 21, and on March 25 a motion to refer the whole bill to the Judiciary Committee was defeated. A motion to recommit to the Committee on Finance was defeated on March 26, and the bill was referred to the Committee on the Judiciary on March 27.

As the bill stood on March 27, when referred to the Committee on the Judiciary, it contained sixteen sections, as against two sections in the original bill of December 4, 1889. These amendments had changed its whole form and shape beyond recognition, by the insertion of the option and future suggestions of Senator Ingalls, and the amendments of Senator Reagan, which went quite far in questions of jurisdiction, and in descriptive definition of what constituted a trust.

It is evident from the discussions in the Senate—and you must remember, Mr. Chairman, that this bill was under consideration and discussion in the Senate from August 14, 1888, until April 8, 1890, when it was passed, so that for over a year and a half the Senate had this subject constantly before it, and the proceedings are full of it—that the Senators felt a great sense of their responsibility; and it is interesting to observe that hardly a partisan note was struck in the whole course of the discussion. The gentlemen thoroughly appreciated the problem they had to meet. On the one hand they found an immense evil, and on the other hand they realized the power of Congress to deal with it was exceeding limited. When the bill was finally reported back to the Senate there is a curious comparison between the objections now made to the measure by the gentlemen who seek its amendment, and the opinions of the distinguished lawyers who framed and reported it, in this, that the only ground of objection which such men as Senator Gray, Senator Vest, Senator Coke, Senator Reagan, and Senator Hoar had was that the bill did not go far enough. They did not believe it to be, as Senator George said at one time, severe enough. But Senator Sherman expressed his satisfaction with the bill, for he said that although it was not all that he hoped for, yet he felt that it was the best that the Senate was ready to give at that time.

During the course of this discussion frequent reference was made to the operation of the bill as it was variously presented. I now refer to the amendments, of course, prior to its submission to the Judiciary Committee on March 27. Attention was called a number of times to the effect this bill would have on combinations of labor, agricultural combinations, and various forms of voluntary associations, and it was done chiefly to apply the *reductio ad absurdum* to some of the propositions presented by Senator Sherman. In fact, we find Senator George going so far—and he was discussing the original bill, now, of Senator Sherman—on February 4, 1889, as to

say, when asked by Senator Sherman as to what he thought was the legal effect of its language:

Mr. GEORGE. But yet that is the legal meaning and force of the bill; and I will state to the Senate and to the Senator from Ohio that it is directly within the terms of this bill to forbid any number of persons belonging to or joining a temperance society whose object is to compel retailers of intoxicating liquors to give up their business.

Mr. SHERMAN. Where men agree that they will not drink at all, does the Senator think that is a combination in restraint of the trade of liquor sellers?

Mr. GEORGE. What is it?

Mr. SHERMAN. The Senator, as I understand, now claims that an agreement among several people not to drink whisky or brandy is in restraint of the trade of selling whisky or brandy, and is therefore a combination within the meaning of this bill.

Mr. GEORGE. I insist that a society making an agreement or a combination between citizens of a town anywhere in the Union not to drink nor to use in any way vinous or spirituous liquors, and to persuade others to a similar abstinence, does, in the language of this bill, tend to compel persons engaged in retailing liquor in that community to give up their business, and the doing of that is expressly condemned by the third section of this bill.

I call attention, Mr. Chairman, to the fact that all this discussion was with respect to Senator Sherman's original bill, not with respect to this present law.

Mr. LITTLEFIELD. I believe Senator Blair wanted to except codfish from the effect of the bill.

Mr. EMERY. And a number of other things. Senators suggested people would say: "If you are going to exempt this class from the bill, what are you going to say when those others come along and ask for exemption?"

On March 24, 1890, Senator Teller discussed the bill and called attention to the fact that now, under Senator Sherman's bill, labor combinations would be illegal; for instance, that the Farmers' Alliance would be unlawful per se. Mr. George asked to be allowed to interrupt him, and upon his yielding Senator George said:

Mr. GEORGE. The Knights of Labor, as I understand, are an organization composed of citizens of the different States of the Union, probably of every State of the Union. The object of that organization, as I understand, furthermore, is to increase the price of their wages. Now, increasing the price of wages has a tendency, in the language of this bill, to increase the price of the product of their labor. Are they not also included, then, in the bill of the Senator from Ohio?

Mr. TELLER. When I said that the Knights of Labor were included I meant that they were included both in the civil provisions and in the criminal provisions. In my judgment they are in both. I do not believe that anybody in the Senate proposes to go to that extent. It is suggested to me by a Senator near me that the typographical union would come in in the same way.

Mr. HISCOCK. And it would practically include all the trades unions.

Mr. TELLER. It would practically include perhaps all the trades unions in this country.

So that these gentlemen understood thoroughly what the effect of the original bill would be, and they called attention to it at this time because they were objecting to the form in which Senator Sherman had framed his bill for the purpose of meeting certain conditions, and they told him that under that bill the mere organization of labor, the mere combination itself, would be illegal and criminal. They were not discussing the question that is presented here by the Hepburn bill as to the exemption of the operations of these organizations

or certain of their acts from the operation of the law, nor is the bill they criticised the act as it now is. The gentlemen thoroughly appreciated the difficulty of their subject, and they expressed it a number of times. Senator Morgan dwells on that at length on March 25, 1890. He says:

It is an intricate question. It taxed the powers of the British Parliament, with all of its omnipotence, about two centuries to meet these combinations and conspiracies in trade and about trade.

Then he uses language here which would indicate that Senator Morgan at that time was thoroughly satisfied that the law could apply to organizations of labor, and he did not know but what it ought to right then and there, and the following interesting remark is made:

The Senator from Nevada [Mr. Stewart] has called attention to a very important topic in this connection. I do not know of anything that has a greater or a more direct impression upon our foreign commerce and our interstate commerce than the price of labor. There are combinations among our laboring men of various different fraternities continually being made for the purpose of raising the price of labor. The price of labor when raised by combination—or, if you please so to call it, by a conspiracy, or in the nature of a trust confided to the hands of some managing committee, some steering arrangement—combinations of that kind to raise the price of labor must necessarily increase the price of commodities in interstate commerce and international commerce.

Can anybody here answer me that question, as a proposition of law? Senator Morgan there was suggesting that some attention ought to be paid to this subject. We are not intimating that we would have desired or approved, or that it would have been a wise thing, to make unlawful combinations or organizations for the purpose of protecting labor, or anything of that kind; far from it.

The specific proposition to exempt combinations of labor from the operations of the bill makes its first appearance on March 25, 1890, when Senator Sherman proposed in Committee on the Whole what is now substantially the Hughes bill. It reads as follows:

*Provided*, That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor or of increasing their wages; nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products.

It is interesting to observe at this very time that an amendment was proposed by Senator Aldrich of somewhat the same character, and which has considerable bearing upon the discussion of this morning, when the question was raised as to whether or not monopolies or combinations the purpose or intent of which was to lower prices, and not to raise them, ought not to be exempted from the operation of the act or ought not to be given special consideration by the Government. Senator Aldrich proposed on March 25:

That this act shall not be construed to apply to or to declare unlawful, combinations or associations made with a view, or which tend by means other than a reduction of the wages of labor, to lessen the cost of production or to reduce the price of any of the necessities of life, nor to the combinations or associations made with a view, or which tend, to increase the earnings of persons engaged in any useful employment.

On the 26th of March Senator Sherman opposed that amendment on the ground stated by him, very briefly as follows:

In my judgment this amendment practically fritters away the substantial elements of the whole bill.

This question came up in the Senate on the 27th of March, 1890, and I want to call the chairman's attention in that connection to the fact that I am not attempting any quibble when I say that this amendment was not agreed to by the Senate, because there is much in the Senate debates to indicate that the Senate was by no means satisfied with regard to many of the amendments which had been agreed to in the Committee on the Whole, but wanted every opportunity to attack them; and there is a very sharp debate on that subject, which Mr. Edmunds brings to a close, after a number of Senators had expressed their dissatisfaction with these conditions, by saying:

Mr. EDMUNDS. Mr. President, it does not appear to me that there is any difficulty at all about this business practically, although the form of the print, to people who have not followed it all through, might be a little misleading. But if it were misleading in the mere sense of what has been agreed to and what has not, the bill is now for the first time reported back to the Senate from the Committee of the Whole. *Every part of this whole thing, text and amendments—it does not make the least difference which—is open to motions to strike out and insert and every other allowable motion. Therefore no Senator can be gotten into a trap, as it might be called, or be misled in respect of losing any right to propose to change the bill, to leave something out, or put something in anywhere in it from top to bottom;* and the Senator from Ohio is entirely right in saying that these amendments, when they are reported from the Committee of the Whole, must be taken in the order in which they stand in the bill.

Again that is referred to, and there is evident dissatisfaction with a number of amendments, so that when I say that the labor amendment was agreed to only in the Committee of the Whole, not by the Senate, and that it is by no means certain it would have been accepted in the Senate, especially as the argument against it was made in the Senate on March 27 for the first time, and when the argument was concluded it was never answered.

Mr. GOMPERS. Does Mr. Emery object to a question?

Mr. EMERY. No.

Mr. GOMPERS. Ought not the adoption of the amendment by the Senate in the Committee of the Whole to be taken as presumptive evidence that that was the ostensible desire of the Senate?

Mr. EMERY. I will assume that, if you wish, because the assumption I make against the intention of the Senate or the intention of the legislature not to exempt labor organizations from this bill is by no means dependent on so trifling an incident as the one I am now discussing. I merely called attention to that because that is the thing that is constantly emphasized by yourself.

Mr. LITTLEFIELD. That is, your proposition is that there were quite a variety of amendments in addition to that?

Mr. EMERY. A great number.

Mr. LITTLEFIELD. And your view is that it did not indicate a settled condition of mind on the part of the Senate?

Mr. EMERY. The question was never discussed until the 27th of March. It had been agreed to in the Committee of the Whole on the 26th, and on the 27th that proposition was discussed.

Mr. GOMPERS. Senator Sherman stated that he embodied that proviso as suggested by Senator George, of Mississippi, and said that this ought to be satisfactory to the whole.

Mr. EMERY. That is all right. I will reach that in a moment. I will cover the subject fully.

Mr. GOMPERS. I thought you were going to some other subject.

Mr. EMERY. No. Mr. Edmunds began his discussion in the Senate on that question of exempting labor organizations and combinations. He discussed the evil of conflicts between combinations, and called attention to the industrial conditions which existed in Washington, and the fact that some of these very combinations that were under discussion were making it exceedingly difficult, if not impossible, for a man to secure employment in the Government Printing Office. He said, on March 27, 1890:

I remember it is but a few months since that a citizen of the United States, as I was told, and I believe truly a man of good character and little money—they sometimes go together, Mr. President, even in the Senate of the United States—a man of good character and little money, with an interesting family, a practical printer, ingenious, skilled in his business, applied to be employed at the Government Printing Office, the national, legislative, and executive establishment to print the wise and learned things that we say from day to day. The Public Printer, I was told, wanted him; he was exactly the man for the place which was vacant, but unhappily, although a citizen of the United States of good character and skill, the Public Printer was told that if that man was suffered to enter into the employment of the United States nine-tenths, perhaps place which was vacant, but unhappily, although a citizen of the United States, in that establishment would not do any more work and would leave, and the country would go to destruction immediately, because what we should have said yesterday would not appear in the Record to-day. The Public Printer, I believe, was not able—I will not say did not dare, but did not think it expedient—to take the man he wanted because, although a citizen, he did not belong to one of these particular camps.

If that is not tyranny, I do not know what is, and I think that the tyranny of a thousand men is infinitely worse than the tyranny of one man. All human experience and all human history prove that. The tyranny of the Commune in France while it lasted was infinitely more wicked than the tyranny of the King that the Commune overthrew.

Senator Edmunds very evidently had in mind unions and combinations, with which we are entirely familiar to-day, which were active at that time, and which three years after that very discussion tied up the interstate commerce of the whole country.

I want to call attention now to Senator Edmunds's argument as to why labor organizations should not be excepted from the operation of this bill. There are a number of things he discusses, and I am not making any invidious distinctions in the text, but I am only reading that part of it which seems most applicable. I do not want to read all of it. He goes on to talk about the organizations on both sides, and he says:

I think the amendment is wrong in the same way, which says that while the capital and the plant in any enterprise shall not combine to defend and protect itself, to increase the price of the product of that capital and plant, the labor which is essential to the production of that plant may combine to increase the price of the work that is to be done to make the production of that enterprise.

What is the consequence, Mr. President? The laborers of the United States, I will say, for illustration—and one illustration is as good as the hundreds that might be brought forward—the laborers of the United States engaged in the manufacture of iron (which is perhaps the most largely valuable, take it altogether, of all the manufactured products of the United States) combine, as this bill authorizes them to do, to put up the price of their wages; they put them up 50 per cent, for illustration. The manufacture of iron, the men who and whose fathers by their labor have found the iron mine and have built the iron mill and the rolling mill, and the steel-process mill, and all that sort of thing, are prohibited under penalties, as they ought to be under penalties if they are prohibited at all, from combining to raise the price of the iron that the workmen have made cost 50 per cent more and to sell at the advanced price if they can.

The consequence would be that if the labor of the United States thus organized chose through its headmen to put up the price of the manufactured iron, that iron could not be produced unless the price at which it was to be sold should be enhanced accordingly. The result is that every iron mill in the United States must break or live, not according to the demand for iron, not according to its production, but according to the will of the men employed to make it. Now, put it the other way—

Mr. GEORGE. Will the Senator allow me to ask a question?

Mr. EDMUNDS. Yes.

Mr. GEORGE. Can not the manufacturers of iron practically put up the price, each for himself, according to the cost that it may be to him to manufacture, without combination?

Mr. EDMUNDS. So he can, undoubtedly, and so can the laborer put up the price in any particular mill of his labor in making that iron. They stand on a perfect equality before the law and in morals. There is no sin, I take it, in a perfect equality before the law and in morals. There is no sin, I take it, in owning an iron mine or an iron mill; it is morally right. There is no sin in being a puddler in a furnace, I take it; it is a moral right, and the income of the work of that puddler, his labor and his muscle and his intellect, are the capital that he puts into it. The product is the iron.

Mr. GEORGE. Allow me to ask another question.

Mr. EDMUNDS. Certainly.

Mr. GEORGE. If the capitalists, the manufacturers, are allowed to combine, they having large capital, they having the means to live and support their families during a shut out or a shut down of the work, what good will a combination of the laborers do when they would starve for want of their daily wages to feed themselves and their wives and children?

Mr. EDMUNDS. It will not do any good at all; and if, on the other hand, the laborers combine and say, "We will not do this thing anywhere in the United States of America unless you give us all there is in it, and you shall not arrange among yourselves not to destroy each other and sell your things by common consent at a higher price than you did before, unless you go to the penitentiary" (for that is prohibited), what good will that do except to break down the whole interests of society and destroy everybody?

The fact is that this matter of capital, as it is called, of business, and of labor is an equation, and you can not disturb one side of the equation without disturbing the other. If it costs for labor 50 per cent more to produce a ton of iron, that 50 per cent more goes into what that iron must sell for, or some part of it. I take it everybody will agree to that.

Very well. Now, if you say to one side of that equation, "You may make the value of the price of this iron by your combination for wages in the whole Republic or on the continent, but the man for whom you have made the iron shall not arrange with his neighbors as to the price they will all sell it for, so as not to destroy each other," the whole business will certainly break, because the connection between the plant, as I will call it for short, and the labor that works that plant is one that no legislation and no force in the world—and there is only one outside of the world that can do it—can possibly separate. They can not be divorced. Neither speeches nor laws nor judgments of courts nor anything else can change it; and therefore I say that to provide on one side of that equation that there may be combination and on the other side that there shall not, is contrary to the very inherent principle upon which such business must depend. If we are to have equality, as we ought to have, if the combination on the one side is to be prohibited, the combination on the other side must be prohibited or there will be certain destruction in the end.

Then the discussion goes along on other lines. Senator Hoar got the floor and made the statement which Mr. Gompers has frequently quoted, a most excellent statement, of reasons why he thought exceptions should be made. I will not read all of this. Then Mr. Edmunds takes it right up and answers it as follows:

Mr. EDMUNDS. Mr. President, the Senator from Massachusetts, for whose opinions I have the greatest possible respect, understood me quite correctly, as he has stated, and he has stated a great deal better and more strongly than I could the value of improving the condition of the laboring people of the United States, in the sense in which he uses that term, as people who earn their daily bread by the work of their hands, not having accumulated sufficient capital



or not having had sufficient opportunity to go into business for themselves. I agree to all that entirely. But when the laborer, unless he labors for himself in his own plant—and then he is not laboring for wages—when the wage-earner is to earn wages he must earn them from somebody that employs him. That is absolutely indispensable, and it only needs stating; it is the merest commonplace. There must be somebody on the other side of what I called a little while ago the equation. They are inseparable.

The laborer can not earn wages by looking at the sky, as beautiful as it is; he can not earn wages by looking at the sea, as deep as it is. He must earn wages by finding somebody who can afford—unless he breaks and they both go to the bottom—to pay him the price he demands for his day's work. That somebody is a corporation, as the Senator says, as one illustration. That corporation is only an association of persons. There is no corporation in the world and never can be, for business purposes at any rate, that is not simply a form of association of human beings just like the association of the laborers.

He deals, therefore, on the other side with a human being, and he wishes to earn the highest wage he can. If he gets that wage paid to him, the thing that he has done must be worth the money that is paid to him for doing it or his employers will fail, and then he will have nothing to do and the whole business will stop. That sort of thing has happened a thousand times, and it is happening every day in every State of the Union where an enterprise in which five men, ten men, one hundred men, a thousand men and women are engaged in helping carry on by the work of their hands, for wages, goes down into the bottomless pit of bankruptcy, because the amount of wages paid and the other expenses of the establishment do not bring out money enough to carry it on on that scale. There is no getting away from that, and, therefore, if the wage-earner is to command the operation of the statute and the wage payer can not go to the community and to his brother manufacturers in the same town and say, "Let us agree to put up the wages of our laborers in all our establishments, as they wish a dollar a day more, and let us put the price on our commodity that goes out a dollar a ton more, or whatever it may be, to make that good, so that we can all live and get on," the two sides of the equation are not on an equal footing.

On the one side you say that is a crime and on the other side you say it is a valuable and proper undertaking. That will not do, Mr. President. You can not get on in that way. It is impossible to separate them; and the principle of it, therefore, is that if one side, no matter which it is, is authorized to combine the other side must be authorized to combine, or the thing will break and there will be universal bankruptcy. That is what it will come to, and then the laborer, whose interest and welfare we are all so really desirous to promote, will turn around and justly say to the Senate of the United States: "Why did you go to such legislation as that? Why did you attempt to stimulate and almost require us to combine against our employers, and thus break down the whole industry of the country and leave us all beggars? When you allowed us to combine and to regulate our wages, why did you not allow the products that our hands produced to be raised in price by an arrangement, so that everybody that bought them might pay the increased price, and everybody that was making them all around for whom we were working could live also?" I do not think, as a practical thing, Mr. President, that anybody will thank us for making a distinction of that kind.

That concludes Senator Edmunds's statement. After that, Mr. Chairman, that matter is never alluded to again. Nobody ever replied to that concluding argument of Senator Edmunds as to the impracticability and unfairness of exempting one class in a community from the operation of a law that was going to be issued against all forms of combinations in restraint of trade.

I am discussing it at this time, and I might as well say it for Mr. Gompers's benefit, so that he may understand, that I am giving the evidence of certain discussions to show what the intention of the legislators was, in answer to the argument that they never intended or considered that it could apply to combinations of labor.

After the discussion on March 27 the bill, with all its amendments, was referred to the Committee on the Judiciary, to be reported within twenty days. It was reported back on April 2.

Now, Mr. Chairman, all that Mr. Gompers and all those who contend that this bill was never intended to apply to combinations of labor say applied to the bill only before it went into the Judiciary Committee. Every amendment proposed to specifically exempt labor organizations was suggested and proposed prior to that time. There is no record, either in the House or the Senate, afterwards of any proposition to amend this bill so as to exempt any combination from its operation, and the terms of the bill were plainly of universal application. Senator Edmunds was the chairman of the Judiciary Committee. Senator Edmunds was the leading legal figure of the Senate, and as the chairman of the Judiciary Committee you must assume that he had a very influential part in the construction of the substitute bill. It is admitted that Senator Sherman had practically nothing to do with it after it went into the Judiciary Committee, and the Judiciary Committee of that time was the most splendidly equipped body of lawyers that has ever sat in the Senate of the United States.

Mr. DAVENPORT. The bill that came out of the Judiciary Committee was a totally different bill.

Mr. EMERY. I am coming to that. I have called attention to the difference between these bills. Is it to be assumed that Senator Edmunds did not carry the objections that he expressed on the floor, and which were not answered, into the committee room? After these men had sat for a year and a half endeavoring to frame a bill, do you mean to tell me that when one thing after another had been excluded, for no other reason but that it did or might have a tendency to affect the legality of their effort, they would deliberately insert in it a thing that would endanger the whole measure? What positive record is there that any attempt was made after that powerful speech of Senator Edmunds against the labor amendment, what record is there of any attempt ever having been made to repeat such an amendment? None at all. And yet that bill was in both Houses from April 8, when it passed the Senate, until June 20, when the final conference committee report was adopted.

The bill was debated extensively in the House. The statement of Representative Hughes, that it was passed hastily through the House in the course of an hour, is utterly absurd and erroneous. The bill was debated for a number of days in the House. When it went from the Senate to the House, after its passage in the Senate on the 8th of April, it went into the Judiciary Committee of the House on the 25th of April, and was by that committee reported, and debated in the House on May 1, and on that date was passed with what is known as the Bland amendment. It then went to the Senate, and the Senate considered it for, I think, two or three days. It was reported by the Judiciary Committee to the Senate on May 12, with an amendment to the House amendment, and was from May 13 to 16 in the Senate. June 11 and 12 the conferees' report was debated in the House and rejected, and a motion was made for further conference. On June 16 it was debated in the Senate, and there was further conference. On June 20 the conference report was debated, and both Houses receded from their respective amendments.

So, there was ample time, Mr. Chairman, between the 8th day of April, when this bill passed the Senate, and the 20th day of June, when it passed the House and the conference report was adopted

in both Houses, to amend this bill in any way that was necessary. Surely, if Mr. Gompers and the gentlemen who so ably represent the American Federation of Labor were keenly alive to the situation through a year and a half of continuous debate, when the language that they had specifically asked to have incorporated in the act was in the bill they must have carefully observed a measure that was reported and had passed the Senate and the House and was in conference between the two Houses. There was ample opportunity to suggest any necessary amendment. They must have had doubts then as they claim to have doubts now. But there is not the slightest record of any attempt having been made in the Senate or in the House to suggest any such amendment, and with the language as plain as it is, how can any man say that it was not their intention to cover all forms of combinations?

Mr. LITTLEFIELD. Do I understand you to say that there were other amendments relating to other subject-matter submitted at various times during the time?

Mr. EMERY. The Bland amendment, which was made in the House, applied specific language to combinations in regard to interstate transportation.

Mr. LITTLEFIELD. Was that subsequent to the time when this bill which is now the Sherman antitrust act was reported from the Judiciary Committee of the Senate to the Senate?

Mr. EMERY. No, sir.

Mr. LITTLEFIELD. Then I do not get the chronology of it.

Mr. EMERY. I will state it again. The bill never was in conference committee until after it was reported from the Judiciary Committee of the Senate.

Mr. LITTLEFIELD. Now, you say there was a proposition in the conference committee to amend?

Mr. EMERY. No, sir.

Mr. LITTLEFIELD. The bill never got to the House until it came from the Edmunds committee?

Mr. EMERY. It never got to the House until it got there in the form in which it presently is. The Bland amendment was proposed in the House after the bill was reported by the House Judiciary Committee.

Mr. LITTLEFIELD. But it was subsequent to the bill taking the form in which it subsequently became a law—that is, the Bland amendment was suggested in the House after the bill in the Senate took the form that it now has in law?

Mr. EMERY. Yes, sir.

Mr. LITTLEFIELD. Do I get that right?

Mr. EMERY. Yes. Then the bill with the Bland amendment went to the Senate, and the Senate amended the Bland amendment and returned it to the House. The House rejected the Senate amendment, and the Senate rejected the House amendment without its own amendment, and finally the conferees of both Houses recommended that they each recede from their respective amendments, and that left it in the shape in which it was referred to the House by the Senate. Now, I say that between the time it passed the Senate—which was April 8—until June 20, when the bill finally passed both Houses, there was continual debate in both bodies, continual opportunity for any amendment to be offered that might be desired by these gentlemen if they

believed the bill might be understood to apply injuriously to them, and, whether it should be finally adopted or not, it seems likely that the same Senators who offered an amendment on March 26 would be willing to offer an amendment afterwards if they thought the bill still applies to labor.

Mr. GOMPERS. Yes, that is just the position.

Mr. EMERY. That is just the position. Now, Mr. Gompers undoubtedly contends that the gentlemen did not believe that the bill applied to labor combinations after it passed the Senate on April 8.

Mr. LITTLEFIELD. As I understand, he contends that the people who were interested in the bill and interested in its passage expressed their individual opinions to him that it did not apply?

Mr. EMERY. Yes.

Mr. LITTLEFIELD. The proposition is that during the pendency of the bill the opinion was expressed by men interested in promoting the legislation that it did not include labor organizations in its terms?

Mr. GOMPERS. Yes.

Mr. EMERY. There never was any doubt in Senator Edmunds's mind as to what it meant.

Mr. LITTLEFIELD. Your contention is that the legislative history of the bill absolutely contraindicates it?

Mr. EMERY. It specially contraindicates it, when the leading spirit of the Senate always asserted and understood that it covered combinations of labor. He certainly intended that it should, because he said so in a newspaper interview. In the Chicago Inter-Ocean of November 21, 1892—that was before the bill got into court and was held to apply to labor organizations—Senator Edmunds was interviewed and said this about the Sherman antitrust act:

It is intended to and I think it will cover every form of combination that seeks in any way to interfere with and restrain free competition, whether it be capital in the form of trusts, combinations, railroad pools or agreements, or labor through the form of boycotting organizations that say a man shall not earn his bread unless he joins this or that society. Both are wrong, both are crimes, and indictable under the antitrust law.

That is a very clear statement of opinion on the part of the first lawyer of the Senate, and that was not said after the courts had spoken, but before. Now, if Senator Edmunds thought that in 1892, he thought it in 1891, and he must have thought it in 1890, especially after he opposed any attempt to except labor organizations from the operation of the law.

But what is the subsequent history of this subject? It will be admitted, of course, that between 1890 and 1900 the courts did apply the Sherman antitrust act to combinations of labor. In the Workingman's Amalgamated case in New Orleans, in 1893, the very same contention that Mr. Gompers sets up here was set up then, and the court disposed of it in this way. I quote from 54 Federal Reporter, page 996:

The decision in that case was sustained by the circuit court of appeals, and from 1893 it was the law of the land with respect to the application of that statute to combinations of labor. Very naturally, I assume, from 1893, when the decision was made, from that time on efforts were made to amend the act so that it would specifically except combinations of labor.

Mr. GOMPERS. And it was passed by the House by a practically unanimous vote.

Mr. EMERY. Pardon me, Mr. Gompers, but you made very serious objection one day about my "butting in" and, as you said, "advertising myself" in your time. Now, I see that you apparently are advertising yourself in my time. We may treat each other with courtesy in that matter, and I will answer any questions you like if you will just permit me to conclude. I am trying to finish so as to catch a train.

The allusion made to the act of 1900, which passed the House, brings me to the further substantial and confirmatory evidence of the fact that whether or not the Senate intended to apply this act to combinations of labor in 1890, it would not exempt labor combinations from its application in 1900. The amendment proposing to exempt labor organizations from the operation of the Sherman antitrust act appears in the report of a minority of the Judiciary Committee in 1900. It was attached to the bill in the House on June 2, 1900, as an amendment of section 7. It went to the Senate, and undoubtedly the very same arguments that were made for the exemption of labor organizations from the operation of the Sherman antitrust act in 1890 were made in 1900, with increased cogency of argument supplied by the fact that the courts had applied it to combinations of labor, and there could no longer be any question whether the act did apply to them or not.

The statement was made here that some gentlemen of this committee said in 1900 that the act did not apply to combinations of labor, and could not be intended to apply to them, which is absurd on its face, because when the courts had so applied it for ten years no member of the Judiciary Committee could doubt that it did so apply.

The bill went to the Senate amended so as to exempt combinations of labor in this wise:

SEC. 7. That nothing in this act shall be so construed as to apply to trade unions or other labor organizations organized for the purpose of regulating wages, hours of labor, or other conditions under which labor is to be performed.

That amendment, together with the rest of the bill, was referred to the Judiciary Committee of the Senate.

Mr. LITTLEFIELD. Senator Hoar was then chairman of that committee?

Mr. EMERY. Senator Hoar was then chairman of the Judiciary Committee of the Senate. Senator Hoar absolutely opposed the passage of any such amendment. Not only did he oppose it personally, but he said on February 21, 1901, and I will use his language:

There is a further provision that no labor organization or association shall be liable under the act to which this is an addition. I gave, as chairman of the committee, several full hearings to the representatives of the labor organizations of the country who were interested in promoting this legislation, and also to the representatives of the great organization, the Brotherhood of Locomotive Engineers, and they agreed with me, all of them, that these objections were well taken and that the legislation ought not to pass.

There is the Brotherhood of Locomotive Engineers particularly referred to by Senator Hoar as stating that they ought not to be exempted from the criminal features of the Sherman antitrust act. He believed that there should be an amendment that would more specifically define their rights.

Mr. LITTLEFIELD. What are you reading from—the Congressional Record?

Mr. EMERY. When I said that he believed that some amendment should be made that would more specifically define their rights I was not quoting from it. That is the substance of it. Senator Hoar proposed an exemption quite different from that. Let me read it again. The House amendment is:

That nothing in this act shall be so construed as to apply to trade unions or other labor organizations organized for the purpose of regulating wages, hours of labor, or other conditions under which labor is to be performed.

Senator Hoar's amendment is:

SEC. 4. That nothing in said act shall be so construed as to apply to any action or combinations, otherwise lawful, of trade unions or other labor organizations, so far as such action or combination shall be for the purpose of regulating wages, hours of labor, or other conditions under which labor is performed, without violence or interfering with the lawful rights of any person.

That is a very different proposition from the House amendment; so that there is absolutely no justification for the statement that it was intended in 1900, with ten years of the operation of the law in view, to exempt labor organizations from the future operation of the law.

Mr. LITTLEFIELD. That is pretty near the amendment suggested by me in my minority view later.

Mr. EMERY. Yes, sir. Let me further call your attention to some interesting facts. Here is an interesting statement put in here by Mr. Spooner in the course of the debate on this House bill proposing to amend the Sherman antitrust act, on February 21, 1901. Senator Hoar discussed the bill, and the proposition then came up as to whether or not the Senate Committee on the Judiciary should be relieved from further consideration of the bill, and they got into a discussion over this very labor clause. The following occurred:

Mr. TELLER. There was an absolute division on the question whether we would report it to the Senate or not.

Mr. HOAR. Favorably?

Mr. TELLER. No, sir; not favorably.

Mr. SPOONER. Without recommendation?

Mr. TELLER. Without any recommendation. I put that motion myself. The motion was, first, I think, that it should be reported favorably. On that question I was not in favor of voting to report it favorably, I admit. I know it needs some amendment. But on the other question, on reporting it without recommendation, I voted to report it, and so did the minority of the committee.

Mr. SPOONER. This is the record. I was mistaken so far as the record is concerned. A motion was made—I need not state the mover of the motion—that the bill be reported favorably to the Senate with the amendment relating to the labor organizations, and upon that there were 4 yeas, all Democrats, and there were 6 nays, all Republicans. Then the motion was made to strike out the word "favorably" and report it without recommendation.

Mr. TELLER. That is what I said.

Mr. SPOONER. That was lost, but not upon a roll call. I am willing to say, so far as I am concerned, that I voted against it, for I was not willing that the Judiciary Committee of this body should report a great measure like this to the Senate without recommendation.

Mr. HOAR. Will the Senator pardon me a moment?

The PRESIDENT pro tempore. Does the Senator from Wisconsin yield to the Senator from Massachusetts?

Mr. SPOONER. Certainly.

Mr. HOAR. There was no motion made by anybody—Republican, Democrat, Silver Republican, Populist, or by whatever other name people are called in

this world—that the bill should be reported favorably without coupling the motion with some proposed amendment.

Mr. SPOONER. I so stated.

Mr. TELLER. That is correct.

Mr. HOAR. That is correct. We all agree on that.

Mr. SPOONER. I stated that it was proposed it should be reported favorably with your amendment relating to labor organizations. Mr. President, that there are evils in the present situation no man can deny. That they ought to be remedied as soon as possible everyone will admit. They have been much discussed in the country and they were much discussed in the last Congress. A great many propositions of legislation in regard to them were made, some of them absolutely ridiculous, some of them so palpably unconstitutional that there could be no party division in committee upon them.

This bill passed the House. *After it was reported by the Senator from Massachusetts to the committee, with every clause of it stricken out which came from the House, except the proposed amendment as to labor organizations, we had three meetings of that committee devoted to no other subject than a consideration of the bill, at which we talked over, as lawyers do and as lawyers should, the constitutional phases of this legislation frankly and fairly; and I have not heard any man, with perhaps one exception, in that committee express his approval of this bill—only one.*

That is the bill stripped of everything but the labor amendment; and in the Judiciary Committee of the Senate, composed of Republicans, Democrats, Populists, and otherwise, there was only one man that favored the reporting of the bill. Yet, gentlemen say that it was never the intention of the Senate to apply this bill to labor organizations! Here is a record of the fact that the lawyers of the Senate would not recommend any such exception, regardless of their party. Senator Spooner continued:

*Now, Mr. President, so far as I am concerned, I am not willing to be a demagogue upon this subject. I am not willing to enact legislation here upon a subject which I believe to be unconstitutional.*

That is enough. So much, Mr. Chairman, for the history of the bill. It shows, in the first place, that the so-called Sherman bill never became the law. It shows, in the second place, that at the only time when there was debate on the subject the admittedly leading lawyer of the Senate opposed, and opposed with all his power, any attempt to exempt combinations of labor from its operation; that after the bill had gone into the Judiciary Committee and had been reported back the amendment was not there, nor was any attempt made by anybody to amend it so as to specifically exempt labor organizations, but an attempt was made, Mr. Chairman, to apply the law in specific terms to railroad organizations, and it was debated in the House, and it was debated in the Senate, and the amendment specifically stating the application of the law to combinations in transportation to prevent competition never became a part of the law. Consequently, in the trans-Missouri case the contention was raised that the Congress of the United States never intended that the law should apply to combinations of railroads; and they had a much stronger case than can be possibly made by the organizations of labor, because there was a specific amendment applying it to them—not excepting them from it—which was withdrawn from the bill.

Mr. LITTLEFIELD. That was during the time the bill was in conference?

Mr. EMERY. That is the Bland amendment—substantially the Bland amendment. It was then amended by the Senate, but it did

not change its meaning. It simply shortened it, or threw out what it thought to be surplusage.

Mr. DAVENPORT. Oh, no; the amendment in the Senate was to specifically permit traffic arrangements. The Bland amendment specifically forbade anything of that kind. The substituted amendment in the Senate was to permit railroads to agree to maintain reasonable rates. It passed that amendment. It went over to the House in conference, the House refused to adopt it, and ultimately the two Houses instructed their conferees to withdraw both amendments. But the amendment that the Senate proposed to the bill as it now stands was to specifically permit agreements between railroads to maintain reasonable rates. That is the Senate amendment.

Mr. LITTLEFIELD. The Senate proposition is practically a pooling proposition.

Mr. DAVENPORT. Which is Mr. Low's suggestion.

Mr. LITTLEFIELD. And the Bland amendment was an attempt on his part to include in terms organizations of railroad corporations within the meaning of the law, and both of the amendments were eliminated in the course of the conference history of the bill, as I understand it.

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. So that the legislative history, so far as railroads were concerned, would tend to show that they did not intend to include railroads within its provisions.

Mr. EMERY. Senator Hoar said in May:

The addition proposed by the other House contains two things: First, it provides that any contract or agreement entered into for the purpose of preventing competition in the sale or purchase of a commodity transported from one State or Territory to another shall be prohibited, and, then, that contracts to prevent competition in the transportation of persons or property from one State to another shall be prohibited.

Mr. DAVENPORT. They wanted to make sure, so that he made that specific provision; and the Senate changed it so that it specifically permitted traffic arrangements, and it went back to the House and there was an uproar at once, and they said, "This a scheme to repeal the provision of the interstate-commerce act which prohibited pooling."

Mr. EMERY. So much for what the history of the bill demonstrates with regard to the intent of the legislators, first, to apply it and, second, to grant an exemption from its provisions.

I wanted to call the attention of the committee to the manner in which that act has been interpreted by the courts, and to ask the committee if it can find anything in these decisions of the courts which give any just cause for the continuous misstatements by Mr. Gompers; I do not say intentional misstatements, for I do not doubt that Mr. Gompers believes what he says the Loewe decision and other decisions of the courts mean; I have no doubt that he thinks that is what they mean, although they do not. In that case, with Mr. Gompers's profound opposition to the decisions of the courts of the country, if he sets his judgment up against theirs, we will have to accept him as the appellate division of the Supreme Court, I suppose.

Mr. LITTLEFIELD. Your idea is that he absolutely misconceives the meaning of that decision?



Mr. EMERY. Absolutely. I want to say not only that this act does not apply to, or can not be inferred to, prevent or interfere with the combinations of labor for any lawful thing which they have a right to do or ought to be permitted to do, but, on the contrary, under this act a United States judge has advised his receiver, subject to his control, to enter into a contract or a collective bargain with the railroad organizations, and has declared it to be a good and beneficial thing, simply requiring that the contract which they entered into should not have a particular provision which he held to be in restraint of trade, and that the contract with a particular organization should not operate to prevent others not members of the organization from enjoying employment under the receiver.

And let me say in connection with the statement that the courts seem to be unfriendly, or seem to be unfair to organizations of labor, that I can not understand and I do not believe that this committee can understand upon what that continual statement is based. I know that the chief justice of the supreme court of New York has made a statement with reference to the effect which the activities of organizations of labor have had upon judicial interpretation, which is more significant than any reference to the influence of any other organization in the United States by a judge upon the bench.

Mr. LITTLEFIELD. You mean Chief Justice Curran?

Mr. EMERY. Yes; Judge Curran. He said, with reference to the interpretation of labor legislation in the case of *People ex rel Cossey v. Grout*, on November 29, 1904 (179 New York, 417), construing the application of the eight-hour law in an action brought against the city of New York, where a certain scow was manufactured, it was contended that the Constitution interfered with local and municipal independence:

The fear that the many outrages of labor organizations or of some of their members have not only excited just indignation, but at times have frightened courts into plain legal inconsistencies, and into the annunciation of doctrines, which, if asserted in litigations arising under any other subject than labor legislation, would meet scant courtesy or consideration.

So that it would appear, from a remark like that, that the courts were rather afraid of labor organizations, and that they tempered their decisions, not that there was any enmity on their part or any bitterness.

I want to call attention to another matter here that comes up under this decision in the *Workingman's Amalgamated* case.

Mr. LITTLEFIELD. You will call attention to cases showing to what conditions the Sherman antitrust act applies? You are going to do that, are you?

Mr. EMERY. Much of this ground has been covered by my colleague, to whose skill as a pleader, and great learning, the Supreme Court has paid such a high tribute in the case of the *Hatters of Danbury*.

I want to call attention in the first place to this, that no court of the United States, as distinguished from the State courts, has ever hinted or suggested that labor organizations, per se, were unlawful, or has ever said that collective bargaining ought to be discouraged or prevented, or that any reasonable and lawful activity of a labor organization ought not to be encouraged; but, on the other hand, they have always pointed out that the mere assertion that you were acting

with a laudable purpose did not make it a fact; that you were to be judged by what you did, and the legality and the morality of your purpose was determined by your intent and the means which you sought its accomplishment, and that the labor organizations were only aimed at by the Congress of the United States when they were doing things in violation of the law.

The only argument Mr. Gompers has made here is that, as labor organizations do good things, they should be permitted to do bad things; that because they help a great number of men, therefore they ought to be permitted to do everything they want to do; and as they apply to workingmen, they ought to be exempted from all legal liabilities imposed upon other citizens of the United States. In this case they called attention to that very plea, and the Court said:

It is conceded that the labor organizations were at the outset lawful. But when lawful forces are put into unlawful channels, i. e., when lawful associations adopt and further unlawful purposes and do unlawful acts, the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants consists in this that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country.

As Judge Taft said of the Debs strike in his address to the American Bar Association, it was an attempt to take the people of the United States by the throat in order to enforce demands made on third parties.

Mr. LITTLEFIELD. Who draws the opinion in that last case?

Mr. EMERY. Judge Billings. That case was affirmed in the circuit court of appeals of that district.

I want to refer now to the case of *Waterhouse v. Comer*, (55 Federal Reporter, p. 150). This is a petition filed by Waterhouse and a "committee of adjustment of the Brotherhood of Locomotive Engineers" against H. M. Comer, receiver of the Central Railroad and Banking Company of Georgia, asking that the receiver be directed to make a contract with the locomotive engineers.

Mr. DAVENPORT. What is the date of that?

Mr. EMERY. April 8, 1893. I read this to call your attention to what the court said.

Mr. LITTLEFIELD. Is that the case where the receiver was authorized to make a contract or a bargain with employees?

Mr. EMERY. Yes, sir. The receiver answered that he did not want to enter into a contract with the Brotherhood of Locomotive Engineers because they were liable to cease relations on short notice, and he was likely to get caught in a pinch. That is practically the way he puts it here. The court said:

The gravity and importance of the considerations thus presented are exceedingly great. The control, under any circumstances, by the courts of contracts between representatives of the immense values invested with corporations engaged in the public duty of transportation, and the laborers employed in the same service, will doubtless appear to many as novel and dangerous. It is well, however, to consider if a proper provision, by appeal to the courts, in the frequent and destructive conflicts between organized capital and organized labor, will not afford the simplest, most satisfactory, and effective method for the settlement of such controversies. Is it not the only method by which the public and, indeed, the parties themselves, can be protected from the inevitable hardship and loss which all must endure from the frequently recurring strikes?

It will not be wise for those engaged with the maintenance of public order to ignore the immensity of the changes in the relations of the employing and the employed classes, occasioned by the phenomenal development of commerce and the prevalence of labor organizations. We are in this case directly concerned with a corporation and a labor organization, and both engaged in railway transportation.

Then he goes on to make some observations about the immensity of the interests, and he says:

Certainly, it follows, then, that it is in the power of the court, in the interest of public order, and for the protection of the property under its control, to direct a suitable arrangement with its employees or officers, to provide compensation and conditions of their employment, and to avoid, if possible, an interruption of their labor and duty, which will be disastrous to the trust and injurious to the public. There is no reason why the receivership, in this respect, should be conducted in a manner differing from the large preponderance of the successful and prosperous railroads of the country. It appears from the proof that about 90 per cent of the railroads of the United States make contracts or schedules of rates and regulations for the employment of their operatives, which are agreed to by the representatives of both parties. We are satisfied from these facts that such arrangements, under proper restrictions, are praiseworthy and beneficial to both parties, and we therefore shall not longer hesitate to direct the receiver to enter into an appropriate contract or schedule of rates and regulations with the engineers. This contract, however, will not be restricted to members of the Brotherhood of Locomotive Engineers, although membership of that order is and will be no disqualification to service on railroads under the control of this court so long as the rules and regulations of the order are treated as subordinate to the law of the land. The contract will comprehend all engineers employed by the receiver, whether members or non-members of the brotherhood.

That is certainly a very fair proposition, Mr. Chairman. Then he goes on to discuss this particular proposition that is put here. He finds this rule to be part of their proposed contract:

(12) That hereafter, when an issue has been sustained by the grand chief and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of the obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with or adjacent to said road to handle the property belonging to said railroad or system in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues of difference of any nature or kind have been amicably settled.

That is rule 12 of the Brotherhood of Locomotive Engineers, which was held to be in restraint of trade in the Toledo and Ann Arbor case. The court declares that "it is plainly a rule or agreement in restraint of trade or commerce," and he goes on to apply it in this way:

Construing these several enactments together, it will be seen that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade and commerce of the country, will be obnoxious to severe penalties. This will apply with even greater force to persons in the employ of the railroads concerned.

Mr. DAVENPORT. Under that rule the engineers of a connecting road were bound not to haul the cars of another railroad against which they declared a strike.

Mr. EMERY. That rule was a part of a contract of the Brotherhood of Locomotive Engineers with the Toledo and Ann Arbor Railroad, and the engineers on the other road refused to haul their cars, and

the Pennsylvania Railroad was about to refuse them when an injunction was obtained against them, and this rule was held to be in restraint of trade.

Mr. LITTLEFIELD. They authorized a contract with that organization, eliminating that rule; recognizing the validity of the organization, notwithstanding that rule was one of their rules.

Mr. EMERY. Yes. There are a number of interesting cases along that line I wanted to call your attention to, and I wanted to call your attention especially to the phrase which Mr. Low and Mr. Jenks and others have settled as a definition in section 4, providing that "nothing in this act"—referring to the Hepburn bill—"shall be construed to prevent any strike for any purpose not unlawful at common law;" and they suggest that definition as a standard of action, and I want to call the attention of the committee to what the common law was with respect to combinations, assuming they mean by the phrase the common law of England—if that is their purpose. Of course as to the legal value of such a standard, whether or not it is definite or indefinite, in a criminal provision—because, of course, that is a criminal provision, and a man is liable to be imprisoned for a combination that is for a purpose unlawful at common law—certainly the question would have to come up afterwards as to whether that was a sufficient description of an offense, and, further, as to what common law was referred to. If it was the common law of the United States, of course there is none, and there is no possibility of conferring common-law criminal jurisdiction on courts of the United States. If the chairman will permit me, I will suspend now.

Mr. DAVENPORT. Mr. Chairman, I understand that the proponents of legislation of this character have evolved a final perfected bill, and Mr. Low has kindly sent me a copy, and I suppose it would be advantageous to hear what their changes are and what the idea sought to be accomplished is.

Mr. LITTLEFIELD. Let me suggest this. Mr. Gompers is here, and is anxious to be heard for a few minutes, because he has to be away later on, and perhaps would not return until after the hearings are over. Is it agreeable to everybody that Mr. Gompers should be heard now?

Mr. DAVENPORT. It is to me; certainly.

#### STATEMENT OF HON. SETH LOW.

Mr. Low. May I repeat before Mr. Gompers the substance of what I said this morning in his absence, that the clause referring to labor in the Hepburn bill as it came originally to this committee, which was the basis of Judge Davenport's suspicion as to its intention, was inserted into the bill at my suggestion. It was not proposed by Mr. Gompers, and in the form in which it appeared in the bill he never saw it until it was printed; and the fact that Mr. Davenport discovered in it so much that was not there perhaps throws a little bit of light upon the character of some of his other criticisms upon this act.

Mr. DAVENPORT. Well, we have discovered to-day who drew it, and the thought darted into my mind "Professor Low did not draw it, and Professor Jenks did not draw it, but Mr. Morawetz, who represents one organization, and Mr. Stetson, who represents another,

might have drawn it," and it occurred to me possibly that might be the sop thrown, or a proposition made, to secure the support of others for this bill.

Mr. Low. The saying is "Evil to him who evil thinks," and if this bill can only be interpreted on its merits, just as it appears, I think it will be much more correctly interpreted than on the basis on which it is.

Mr. LITTLEFIELD. That is a historical motto.

Mr. Low. Mr. Chairman, I shall not be able to be present myself at any hearing next week, unless it is on Saturday, and it is possible I may have to be before the Senate committee on that day, and if before this meeting adjourns I may say a few words in summary. I do not know that there is any reason why the hearing should not go on to completion on the part of those who oppose the bill, notwithstanding my inability to be present.

Mr. LITTLEFIELD. Of course, subject to reasonable limitations, I want to have the hearings so conducted as to be satisfactory to everybody that is interested in the measure. I do not want to have any hearings go on in the absence of yourself and Mr. Jenks where you prefer to be present, because I think you are entitled to hear all the criticisms that are made.

Mr. Low. Mr. Jenks can be here on Thursday. Personally, I can not.

Mr. LITTLEFIELD. Would it be agreeable for you to have a continuation of the hearing after we get through to-day, on Thursday?

Mr. Low. Entirely.

Mr. DAVENPORT. That brings up this question: Here is, in embryo, apparently a new bill which has been drafted, with certain very radical alterations, as it seems to me, in the scheme proposed, to either the bill before the Senate committee or the bill before the House committee, and I thought that those changes and the purpose of them and the scope of them would be expounded here before us.

Mr. Low. I shall be very glad to go on now.

Mr. LITTLEFIELD. Mr. Low has submitted to me—on yesterday—what I understand he calls the new draft.

Mr. Low. Yes.

Mr. LITTLEFIELD. But so far as that is concerned, from now on it may be treated as the substantive proposition, and take the place of the other bill.

Mr. Low. Of course that draft is merely, first, a rearrangement in the order of the sections, in the interest of clearness. The whole object of the suggestion that the action of the Commissioner of Corporations should be subject to a rehearing by the Interstate Commerce Commission as being fitting for the purpose, and to a possible review by the court, is to meet the feeling expressed in many quarters that the original bill reposed and lodged too much power in the hands of one person. As you know, the first suggestion that was made was to transfer that duty entirely to the Interstate Commerce Commission, on the ground that it was desirable to unify this entire control of commerce under one head, and also because that body consisted of more than one member. We discovered when we attempted to proceed along that line that it would very seriously interfere with the

organization of the Bureau of Corporations, and perhaps introduce a confusion into the administrative side of the Government as organized, that made it very unwise, and it seemed to us that the very same end could be accomplished by the process suggested in these amendments. So far as the rehearing by the Interstate Commerce Commission goes, I think it introduces no new question as to the character of the power; it is just the same in one instance as in the other. I suppose that the suggestion that there be a review by the court, and the applicability of it, does depend upon whether that is a judicial or administrative or legislative power. I do not personally feel that it would be very much injured if that review by the court was not embraced in the bill, because I suppose that upon any substantial legal or constitutional questions it would get into the court anyway, and an opportunity for an administrative rehearing I think would meet the practical demands in almost every case. On the other hand, if it was legal and practicable to put in the review of the court, it seems to me it would be better. It seems to me it goes entirely parallel with the action taken in respect to the Interstate Commerce Commission in the fixing of rates. That is all there is to that proposition.

Mr. LITTLEFIELD. Mr. Smith, as you will remember, recognized a very substantial legal distinction between determining the rate of transportation and the price of the product.

Mr. Low. I do also, Mr. Chairman. I do not attempt to confuse those two things. And, notwithstanding that, I think that the very fact that under this Sherman antitrust act not only railroads, but all business enterprises, as well as the labor unions, have been brought in under common regulations, shows that it is not worth while for the Government to try to deal with these questions as if they were absolutely distinct. Legally they may be, but practically they are very closely united. If you go back of what appears upon the surface, in a great many cases the same men largely own and altogether direct the great industrial corporations, and also the railroads, and I do not believe we can get the best results if we attempt to deal with them as if they were two entirely different things. In other words, I think it is a distinct improvement that is aimed at in this new suggestion of ours to bring the Bureau of Corporations and the Interstate Commerce Commission into close touch with each other along all this line of questions. I think that is a far better arrangement of the general interests than to have them kept apart as if the two things were entirely distinct.

The only other change in the bill, as I recall it, is in the section relating to railroads, where we have endeavored to restrict its operation to traffic agreements in the sense approved by the Chicago conference and objected to by Judge Cowan. You will recall he objected to pooling as the combination of roads, and speaking of those he represented, he spoke very freely in favor of recognizing the right of traffic agreements to regulate rates in certain territory.

Though we felt, when the bill was being drawn, that the interstate commerce laws and the rebate laws were not affected at all by this law, and therefore I was not entirely prepared for the broad interpretation given to section 11 by Judge Cowan, it seemed to us wise in submitting any amendments at all to try—

Mr. LITTLEFIELD. Right there you are calling my attention to your language or the language of your committee in relation to pooling, and it was suggested to my mind to inquire just what was contemplated by this provision, which says "not including pooling or freight or earnings hereafter made." Why do you exclude? When you say freight or earnings, do you not cover about all the activities of the railroad?

Mr. Low. I suppose the intention of that phraseology was to cover the actual conditions—sending so much freight by this line and so much by that, or putting all the earnings into the pool and dividing them. I think there is an absolute distinction between that operation and an agreement by which all the railroads in a certain territory agree to make common rates between given points.

Mr. LITTLEFIELD. Do you not get about the same ultimate result as you would with a pool? Can not they produce the same results by traffic agreements that they can produce by simply an ordinary pool?

Mr. Low. I am not prepared to say what people can produce by any sort of agreement, Mr. Chairman. I think there is a clear line of distinction I have in my own mind. Perhaps that is not happily phrased, but that was the purpose of it.

Mr. LITTLEFIELD. Of course, I do not know exactly what was had in mind by the use of that language; that is, I do not know exactly what condition of contracts or what state of facts is intended to be covered by the language used here. I am not familiar enough with the railroad business to apply that.

Mr. Low. You remember that Mr. Cowan was very much opposed to pooling?

Mr. LITTLEFIELD. Yes; and not at all to traffic agreements. I understand a traffic agreement in that sense to be an agreement between roads between common points to agree upon rates among themselves. Would not a traffic agreement, however, be broad enough to cover not only the matter of rates, but the traffic transported, and produce absolutely common results?

Mr. Low. If it was not for the wording we have put in as to not covering the freight or earnings.

Mr. LITTLEFIELD. Yes; but do you not use "pooling" there in a very technical sense, that of simply putting into a common treasury the earnings of all the members who are members of the pool, whereas you might keep the earnings entirely separate by virtue of traffic agreements and then control the amount of the traffic transported and the amount paid and get substantially the same result through agreements that you would get through the more simple method of putting all in one pool and dividing?

Mr. Low. It might be better to get from the Interstate Commerce Commission the form of words that would be most happy. I did not think to do that, I confess; but the idea we had in mind I have tried to explain.

Mr. LITTLEFIELD. What railroads are there that want to be allowed to do these things? What specific roads?

Mr. Low. I do not know; but I know at a conference in Chicago, not the railroads only, but the business men and men representing every organization that was there expressed themselves in favor of

this. There was but that one resolution upon which the conference could act unitedly.

Mr. LITTLEFIELD. And as to the railroad people, it must be largely academic. Is it not a fact that the men who are now operating the railroads ought to be the men who are able to give us specific information on that point?

Mr. Low. Yes; I have no doubt they could.

Mr. LITTLEFIELD. Of course, as to what I might think of it—or another person situated as I am—it would be largely academic, and predicated upon the impression I might get from the general situation.

Mr. Low. May I say a few words on the general situation as it has been developed by the hearings?

Mr. LITTLEFIELD. Certainly.

Mr. Low. I may not get another opportunity when I can do so. I think that it is possibly apparent to everyone here who has followed these hearings that, personally, I have approached this subject not at all from the point of view of a lawyer, but from the point of view more of a business man who has had experience in those lines himself, and who has been more or less in touch with others who are so engaged; and I think it is clear that the business community—I do not mean now simply the large so-called trusts or combinations or the railroads, but I think the entire business community—feels that there is a need of some modification of this Sherman antitrust act. I think that was shown by the attitude of Mr. Towne. While he was opposed to this particular bill he did recognize that, for the purposes of general business, the law ought to recognize in some way that uncontrolled competition spelled “ruin.” Of course, the difficulty is to find the middle ground between the extreme embodied in the Sherman law, forbidding all restraint of trade, and the other extreme of having no restraint of trade. That was the condition in which we practically were before this Sherman law was passed, and I do not believe that anybody wants to return to it. And I repeat now what I said in the beginning: That while this bill may not be the very best form to bring about that result, I do think that the purpose of the bill has been fully justified by these hearings, by the effort to find some way of amending the Sherman law which will make it possible for business men—under proper circumstances, if you please—to combine in restraint of trade under certain conditions, and to do it lawfully.

I remember that President Lincoln once said to General Scofield, and I had the opportunity to confirm the story from the mouth of General Scofield himself, when he sent him to Missouri after Fremont had resigned, that he was sending him to the most difficult position in the country, because there the community was sharply divided; and he said to him, “General Scofield, if one side praises you and one side blames you, I can not tell where I am, but if both sides blame you or if both sides praise you, you may count on me to my dying day.” I think we may say of our bill that we have at least struck the middle ground. It does not perfectly satisfy either extreme. We have not succeeded in satisfying the business men entirely, and we have not succeeded in satisfying our friends, the Federation of Labor; although I ask you to notice that Senator Hoar, when this matter was under consideration in 1901, took exactly this



situation—that it is desirable, and that this law should define more clearly what the rights of organized labor are under it. We have tried to do that along the lines which have been abundantly explained.

I think in my opening statement I made the remark that Federal incorporation was a question hardly above the horizon. Perhaps that is just as true now as it was then, so far as general opinion goes; but I confess that the effect of these hearings upon me has been to make me feel that it is the very next thing to be done if it can be lawfully and properly done, and for this reason: It has been brought out in a way to make it abundantly clear that while the States can control the agencies that do enter interstate commerce because they preempt them, the States can not control the commerce that is done, and while the United States can control the interstate commerce that they do, it can not control the agencies that do it, because these are created by the States. It is just as though a fire engine throwing a stream of water were located near the border of a State, and the State could control the engine, but not the stream; and the effort is to produce a result that is desired in the United States by controlling the stream without any control over the engine, and it would be bad enough if the engine threw two separate streams, one of interstate water and the other of State water, but the fact is that it is all intermingled, and it is only the drops that stop within the State line that are controlled by the State and only those that go over the State line which are controlled by the United States. In other words, it seems to me the very first thing to be done in order to secure by the United States the regulation of the interstate commerce that is contemplated, I think, by the Constitution, and certainly is desired by a great many people in the light of modern development, is to bring about a situation where the United States can control not only the interstate commerce that is done, but the agency that does it, and I suppose that can be done either by an act providing for the Federal incorporation of interstate commerce, or possibly by some amendment in the corporation law of the District of Columbia, which is clearly within the power of the United States legislative body.

Mr. LITTLEFIELD. Do you think Congress, under the power to regulate commerce, could create a corporation to do State business?

Mr. Low. No, sir; but I think it could create a corporation to do interstate business, and I think if that system was begun as a voluntary system it would not be very many years before it would become the only system under which interstate-commerce business was done.

Mr. LITTLEFIELD. Yes; but the court held in the Knight case that production and manufacture was not interstate commerce, and you have got to have production and manufacture in the first instance before you can have commerce in the product manufactured.

Mr. Low. That is true; but at the present time the same control operates in manufactures as does in the interstate commerce, only it is a later proceeding.

Mr. LITTLEFIELD. Yes; that is true. The State can charter a corporation that can do business anywhere and at all times, but the United States can not charter a corporation to do business in interstate commerce.

Mr. Low. Could not the Federal Government charter a corporation under the District of Columbia?

Mr. LITTLEFIELD. Yes; but that is under our municipal jurisdiction. That does not advance the matter any. Corporations are chartered now in the District of Columbia every day; and I may go further and say that I think the District of Columbia has got one of the meanest incorporation laws in the country.

Mr. Low. It had better be made one of the best.

Mr. LITTLEFIELD. I think so.

Mr. Low. I am not a lawyer, and I do not undertake to say whether the thing can be done without an amendment to the Constitution.

Mr. LITTLEFIELD. I understand your difficulty.

Mr. Low. But this I do know—that of the five countries, Switzerland, Germany, Mexico, Brazil, and ours, ours is the only one that does not put the whole subject of commerce under the General Government; I suppose because our Government was formed before the railroad was thought of. I do not think it involves criticism; it is only a statement of facts, and I suppose the explanation of it may be, or one can say certainly that the explanation is, that it was formed at such an early period that the railroad and other things that disregard the State line had not been thought of. Those came in later and that result has followed, whether that was the cause or not. The present situation is, it seems to me, of absolute ineffectiveness, because neither the sovereignty of the State nor the sovereignty of the United States covers the whole situation. The State covers the agency, but not the thing it does. The United States covers the thing it does, but not the agency that does it. And if anything more weak from the point of view of effective regulations on the part of either sovereignty could be thought of, I think it would be difficult to imagine it.

Mr. LITTLEFIELD. Is it your idea that those conditions have resulted in producing any embarrassing financial situation through the country at large?

Mr. Low. I think that right in the face of this Sherman Act we have seen the greatest combinations formed; I do not say in restraint of trade, because I do not know, but we have certainly seen the greatest concentration of wealth and of power in industry and in commerce that was ever known of; so that the law has not been effective to prevent that, and yet that, I suppose, is exactly what it was enacted to do.

Mr. LITTLEFIELD. Whether that may be so or not, has, in your judgment, the existence and the operation of the law produced any serious financial embarrassment?

Mr. Low. I think it is a very important element in the psychological condition of the business men to-day. I think the uncertainties of it, and the fear on the part of business men of unintentionally rendering themselves liable to the penalties of this statute, form one of the greatest incubuses that hang about the business world at the present time; and it is because I think so that I have been willing to give the time I have given, and to make all the effort that it has involved, to try to suggest some practical way of improving the situation.

Mr. LITTLEFIELD. One phase of this bill I wanted to call to your attention a little more specifically, and I will preface it by the suggestion that I suppose that all realize the fact that the Bureau of Corporations up to date has already been subjected to considerable

criticism—I am not now suggesting whether well founded or otherwise—on the ground that undue use either has been or might be made of it as a factor in political campaigns. I suppose that all know there has been more or less criticism on that line. Now, the question is whether this provision of your bill which authorizes the President at any time to change his rules and regulations after corporations have been registered might not be open to that criticism. For instance, so that I may get the full situation before you, suppose a corporation to-day is registered and enrolled and has complied with the conditions up to that time established. Now, it is open to the President, if I understand your theory correctly, to change those regulations at any time he likes. If I understand your bill right, it is quite open to the President of the United States at any time to promulgate a new regulation with which corporations must comply.

Mr. Low. It must be general, of course.

Mr. LITTLEFIELD. Of course; it must be general. We have an existing administration under which we will assume, for the purposes of illustration, that the great bulk of the great corporations of the country may have registered. There is a change in administration, and it may be perhaps expected, possibly with some foundation, that when the change comes about there will be other and more onerous regulations prescribed by the next President. Under those circumstances what would be the natural political tendency of this legislation? Would it be open to any criticism on the ground that the great corporations in existence, registered in order to maintain their status and preserve their clean bills of health, might be induced perhaps to endeavor to maintain the existence of the administration under which they had registered in order to prevent the election of an administration which might give an adverse or a more onerous regulation?

Mr. Low. Mr. Chairman, I think that everything that brings about connection between business and Government is per se objectionable if it can be avoided.

Mr. LITTLEFIELD. Yes; but this does it directly, does it not?

Mr. Low. It is always possible to abuse power. As we have stated in the progress of this discussion, it is just as satisfactory to us to have the suggestion inserted in the bill to meet the inquiry.

Mr. LITTLEFIELD. Take your bill as it stands now; having had your attention called to this, will you say whether or not in your judgment it would be fairly subject to the criticism that it might be abused for political purposes?

Mr. Low. I do not think the abuse could be very great. It seems to me that the President of the United States is a man upon whom rests a very great responsibility. He moves in the light more than any other being on earth, and everything that he does is bound to be the subject of criticism all over the country, and if he should do a thing of that tendency, it would certainly be very severely criticised. That it would be impossible, of course, I can not say. I do not think the danger is very great.

Mr. LITTLEFIELD. For the purposes of the illustration let us assume that Mr. Bryan, who is certainly a very estimable gentleman, has some views in relation to trusts and combinations, or combinations and conspiracies in restraint of trade, that are not entertained by the

existing Administration. I do not know whether that is a fact, but we will assume that he does, and that he happens to be the nominee of the Democratic party in the next campaign, so that it is well understood that if he is elected more burdensome regulations will be the result. Perhaps some of the immunity conditions of that law will be entirely eliminated. That is not an inconceivable proposition, and it is not intimating that Mr. Bryan is not sincere, and I am not clear that he may not be right about some of his propositions, and it is at least understood that he has standards to be applied under which some corporations could not get immunity under this law. What do you think would be the effect of that as a political proposition?

Mr. Low. I do not believe it would make very much difference in the attitude of these corporations, whether this was a law or not.

Mr. LITTLEFIELD. But would it not give rise to legitimate public criticism?

Mr. Low. It seems to me that the Sherman law as it stands is open to precisely the same objection. I am not sure whether under the Sherman law as it stands Mr. Bryan, if he were President, could not set in motion along those lines. There is just as much motive, if that does constitute a motive.

Mr. LITTLEFIELD. Perhaps I do not make myself quite clear. I understand that Mr. Bryan, taking into account the difficulties involved in this whole situation, and seeing the necessity of getting some standard if he could, might say that in his judgment a corporation that controlled over 51 per cent of the product was an injurious combination. Now, we have the United States Steel Company, for instance, that controls at least 55 per cent of the product. If Mr. Bryan was President of the United States, and he issued a regulation that under no circumstances should any corporation be registered that controlled over 51 per cent of the product, all the corporations in excess of that would be outside of the immunity provision, would they not? And that might be a perfectly honest exercise of discretion on his part.

Mr. Low. If they were outside, they would be only where they are now.

Mr. LITTLEFIELD. That is true, but the point I am trying to get at is whether or not that condition, if it was created by law, would or would not be subject to the criticism that the legislation was open to that political abuse.

Mr. Low. I suppose that anything might be criticised as being open to possible political abuse. But unless the existing situation exempts them so that the adoption of such a resolution does not exempt, I do not see that the adoption of this law, with that power in the President's hands, would have any effect.

Mr. LITTLEFIELD. Suppose that two-thirds of the corporations should realize that the change of administration would result in the adoption of regulations that would eliminate them from the immunity of this law, and that that was a possible thing to be accomplished; do you not think that would be a political factor, or do you not think that the bill would be open to any criticism on that ground?

Mr. Low. I will say they are in exactly that position now. There are provisions under which they get immunity now.

Mr. LITTLEFIELD. They are just as much subject to the law, but you create a condition here by which they would get immunity and be de-

prived of that immunity when this change took place. The question is whether legislation of that character would be open to legitimate political criticism. Perhaps it would not.

Mr. Low. I do not feel competent to answer that. That is a matter of opinion. It is possible that the immunity clause of the fourth section might so change the situation if it became a law that existing corporations could not be attacked except upon the ground of unreasonableness.

Mr. LITTLEFIELD. Yes; and your bill provides that the President can change the regulations under which they continue to be registered, and if they can not register they can not file their contracts.

Mr. Low. There is also a provision in the law that no one can be stricken off the roll without an appeal to the court.

Mr. LITTLEFIELD. The President under this bill has the power to make the conditions more drastic from time to time.

Mr. Low. If he did make regulations which deprived them of this immunity he would simply put them back under the law as it is, without any amendment such as we propose. That seems to me the complete answer to that line of inquiry.

Mr. LITTLEFIELD. It does not seem to you that the possession of that power on the part of the President would be open to legitimate political criticism?

Mr. Low. No; I do not think so. I think the President of the United States has got to be trusted with great power. Of course there is no officer in the world who has so much power as the President of the United States.

Mr. LITTLEFIELD. I have seen several statements in relation to the Hepburn bill and the President's relation thereto. Does the committee understand that the President is behind the original Hepburn bill with all its provisions, or behind this subsequent bill, or has not anyone here authority to make any statement as to his attitude?

Mr. Low. I think the only statement that can be relied upon as to that is the statement made by himself in his own message.

Mr. LITTLEFIELD. Further than that no one can go?

Mr. Low. No, sir.

Mr. DAVENPORT. Mr. Low tells us to look to the law to find out what all this is about, and not to suspect that there is something in it. In calling his attention and that of the committee to the changes that have been made in this substituted bill, there are three pages here which I think are positively revolutionary in their effect upon the bill. Having in mind before us now what has been discussed and what is in the bill, I want to call the attention of Mr. Low to this:

No prosecution, suit, or proceeding by the United States shall be begun under the first six sections of this act for or on account of any such contract or combination hereafter made of which a copy or written statement shall have been filed as aforesaid, or for or on account of any acts done in performance thereof by or in behalf of such corporation, association, or person unless such contract or combination shall be in unreasonable restraint of trade or commerce as defined in section 3 of this act.

The idea is that the proponents of this measure ought to explain to this committee and to those who have occasion to criticise this bill what is meant by it.

Mr. LITTLEFIELD. I think Mr. Jenks will be here at the next meeting, and he can do that.

Mr. Low. He can be here by Thursday. He is not able to be here in the early part of the week. He can be here on Thursday.

Mr. LITTLEFIELD. Do you suppose we can probably conclude the hearings then? Would Mr. Jenks be able to state everything you care to have stated in the interests of the proponents?

Mr. Low. So far as I know; yes, sir.

Mr. LITTLEFIELD. We will adjourn, then, with that understanding.

Mr. Low. Will you not let me say how much we appreciate the very thorough way in which you have gone into this measure?

Mr. LITTLEFIELD. I have got a lot of information myself.

Mr. Low. I want to say that I trust the committee will report the bill I have submitted, and which has been introduced by Mr. Wilson, favorably to the House.

Mr. LITTLEFIELD. We understand that is your wish.

**STATEMENT OF HON. WILLIAM B. WILSON, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF PENNSYLVANIA.**

Mr. WILSON. I presume, Mr. Chairman, that it may be taken for granted that everybody who believes in government believes in organization, and that laws that are passed to prevent certain organizations are passed for the reason that either the purpose or the methods of the organization are injurious to the community at large. The Sherman antitrust act was passed for the purpose of preventing certain organizations or combinations from acting or so conducting their business as to extort unreasonable profits from people. Labor organizations are not organizations for profit. They can not be classed with that kind of organizations. They have no capital stock of any kind whatsoever. They are not engaged in interstate commerce of any kind. Their members have nothing for sale that goes into interstate commerce. The only thing that they have for sale is their labor power. That they have for sale, and the labor power of members of labor organizations is not a commodity that can be used in interstate commerce. In addition to that, there is a rule in equity that two parties to a contract must be of equal power or else the contract will not be equitable, except through the generosity of the stronger party. Labor organizations are the natural and direct result of our industrial development, a direct result of copartnerships and corporations that are recognized and formed under our laws. A corporation is but an organization of men to carry on a given business or to arrive at a given purpose. So that the law recognizes organization in the formation of corporations.

A corporation like the United States Steel Corporation, for instance, employing 200,000 men, under the direction of one man at the head, acts as a unit in dealing with all trade matters, with its employees, and acting as a unit has greater power in dealing with its employees, or with any one of its employees, than that employee could possibly have. One employee seeking to make a wage contract, a contract concerning the terms of employment, would have absolutely no power except to either accept the terms of the corporation, or to refuse to accept them, and if there was a refusal, then the employee would be out of employment for all time to come, because there would be 199,999 men still continuing on at work, producing the material that the steel corporation desired to have produced. In order to be anywhere near

equal in power with that organization in making a contract for wages and terms of employment, the employees, too, must act as a unit as well as those who are members of the corporation who act as a unit through their management. And so, so far as the moral phase of it is concerned, it is absolutely necessary that there should be labor organizations.

Mr. LITTLEFIELD. You do not understand that there is any law that prohibits labor organizations, do you?

Mr. WILSON. I understand that the decision of the Supreme Court makes the Sherman antitrust act apply to labor organizations.

Mr. LITTLEFIELD. It applies to labor organizations when they are engaged in contracts in restraint of trade.

Mr. WILSON. Yes; when they are engaged in contracts in restraint of trade.

Mr. LITTLEFIELD. Do you understand that the decision in the Danbury Hat case prevents or makes illegal labor organizations?

Mr. WILSON. I understand that that decision in the Danbury Hat case makes it illegal on the part of the labor organization or on the part of two or more individuals, whether in a labor organization or otherwise, to agree amongst themselves that that is not the kind of a hat that they want to use.

Mr. LITTLEFIELD. You may look at it from a narrow standpoint, but that does not go so far as to say that labor organizations per se are illegal.

Mr. WILSON. Labor organizations are of no value to workingmen unless they can exercise their collective power for those things that are of benefit to workingmen.

Mr. LITTLEFIELD. I infer that you think that labor organizations ought to be allowed to conduct such a boycott as was held to be within the prohibition of the antitrust law in the Danbury Hat case.

Mr. WILSON. I hold that workingmen, either through their organizations or otherwise, have a right to agree that there are certain things that go into the manufacture of any article which are not satisfactory to them, and until that is changed they will not purchase that article.

Mr. LITTLEFIELD. You are familiar with that case, I imagine.

Mr. WILSON. To some extent.

Mr. LITTLEFIELD. Do you feel that the labor organizations ought to be authorized to do what that case held they were prohibited from doing?

Mr. WILSON. I do. I believe that the law should be so changed. Now, I am taking it for granted——

Mr. LITTLEFIELD. Then you think labor organizations ought to be allowed to engage in what might be called an interstate boycott?

Mr. WILSON. I believe that labor organizations ought to have the right to agree that they will not purchase any article the ingredients of which, or the means of the manufacture of which, are not satisfactory to them.

Mr. LITTLEFIELD. I do not think that goes quite so far as the acts that were described in the declaration in the Loewe case. Are you familiar with the Buck's Stove and Range case?

Mr. WILSON. To some little extent.

Mr. LITTLEFIELD. Do you think that the law ought to authorize such a boycott as was proceeded against in the Buck's Stove and

Range case, where the court issued an injunction restraining the Federation of Labor from continuing that boycott? Do you think they ought to be authorized to do those things?

Mr. WILSON. I believe that the restrictions that the court has held that the Sherman antitrust act placed around them should be removed.

Mr. LITTLEFIELD. Put it the other way. The Sherman antitrust act makes it a crime for any person to enter into a contract or agreement that restrains interstate commerce.

Mr. WILSON. Yes.

Mr. LITTLEFIELD. It does not proceed, on its face, on the question of affecting price, but it proceeds on the theory that Congress in regulating commerce provides that it shall not be interfered with and restrained by anybody or by any agreement, and makes it a crime to do that.

Mr. WILSON. Yes; and in that respect I believe that the Sherman antitrust act goes to a further extreme than is for the welfare of the American people.

Mr. LITTLEFIELD. Let us go a little bit further, so as to see just exactly where your proposition carries you, if you understand it that way. You think that the labor organizations ought to be allowed to enter into contracts and combinations which restrain interstate trade, and other people, entering into the same kind of combinations, producing the same results, should be punished criminally for doing that; that the labor organizations should be allowed to lawfully do what other people are punished criminally for doing?

Mr. WILSON. I believe labor organizations ought to have the right to mutually agree amongst themselves, and the members thereof ought to have the right to mutually agree amongst themselves, that certain articles are suitable for them and agreeable to them, and that they will purchase them, and that certain other articles are not agreeable to them and are not suitable for them, are not manufactured in accordance with the methods or with the ingredients that they believe to be suitable for them, and that they ought to have the right to agree to refuse to purchase that class of articles.

Mr. LITTLEFIELD. They might be able to do all those things, possibly, and not come within the purview of the Sherman antitrust act, depending on circumstances. Of course we had a great combination on the part of wage-earners engaged in interstate commerce by which they undertook to absolutely stop interstate commerce. That was in the Debs case, where Judge Taft held that the character of the organization was such that it absolutely paralyzed interstate trade and commerce, and he held that that combination was one that was prohibited by the Sherman antitrust act. Now, is it your feeling that the labor organizations ought to be authorized to do those things?

Mr. WILSON. I believe that a labor organization, or one or more men, ought to have the right to act concertedly, to leave the employment of a transportation company engaged in interstate commerce just the same as they should have the right to leave the employment of a manufacturing corporation.

Mr. LITTLEFIELD. Even if it does seriously affect or paralyze business extending over a dozen or fifteen lines?

Mr. WILSON. Even if its effect extends over all the lines of the United States.



Mr. LITTLEFIELD. That is what the court held that they could not do in the Debs case. You think the law should be changed so as to allow them to do that?

Mr. WILSON. Yes, sir; I think the law should be so at the present time. It must be remembered that the decisions of the court in the Debs case were complicated not only with the antitrust law, but were complicated also with the interstate-commerce law and the question of interference with the United States mails, and in addition to that the allegation was made that force had been used, that riots had taken place, and those things were all injected into the case. Now, I am not one of those—

Mr. LITTLEFIELD. Those were simply matters of aggravation. They did not affect the original contract.

Mr. WILSON. What is that?

Mr. LITTLEFIELD. They were matters of aggravation, and they did not affect the original contract.

Mr. WILSON. The case was complicated in that manner.

Mr. LITTLEFIELD. But it was not contended in the case that the laboring men entered into a combination to use force or violence. Force and violence, as it happened, were used in the carrying out of the agreement made, but the allegation was not that the men deliberately combined for the purpose of using force and destroying property. The case did not go as far as that.

Mr. WILSON. The injunction that was issued in the Debs case, if I recall it distinctly, expressly prohibited the use of violence in that case.

Mr. LITTLEFIELD. That was proper, was it not?

Mr. WILSON. Proper?

Mr. LITTLEFIELD. Yes.

Mr. WILSON. As to that, speaking for myself, I would say no. Speaking for the labor organizations, they would say yes. Speaking for myself further, I would say that I have no use whatever for a man who uses violence in a labor dispute. I believe him to be a greater injury to the labor movement than a strike breaker is. Notwithstanding the fact that I take that position, I take the ground that so far as the injunction is concerned, and I do not understand we are considering the injunction at the present time—

Mr. LITTLEFIELD. No.

Mr. WILSON. I take the ground so far as the injunction is concerned that a court has no legal authority to issue an injunction restraining any man or corporation from doing anything when there is no property right involved, and when the party complaining has other adequate remedies at law.

Mr. LITTLEFIELD. Where there is an adequate remedy at law the courts can not issue an injunction at all, so that that eliminates the injunction there.

Mr. WILSON. Wait a moment.

Mr. LITTLEFIELD. You are a lawyer, are you not?

Mr. WILSON. No; I am not. Every State in the Union through its legislature, when it has enacted into law what is a remedy in cases of that kind, has provided a remedy against the use of force, has provided penalties and punishments where force is used. The legislative body has determined what is an adequate remedy at law, and not—

withstanding the fact that the legislatures of the various States have provided a remedy at law in cases where force is used, our courts assume that there is no adequate remedy at law, and issue restraining orders preventing the use of force.

Mr. LITTLEFIELD. No injunction can issue under any circumstances except it be to prevent irreparable injury.

Mr. WILSON. That is the ground I take, and the legislatures have provided adequate remedies for the use of violence.

Mr. LITTLEFIELD. You mean they have provided remedies.

Mr. WILSON. Each legislature has provided that which in the judgment of the legislature is an adequate remedy, I mean.

Mr. LITTLEFIELD. There is not any legislation in any State that provides in any sense a remedy for the benefit of the individual, because the individual has to secure his remedy through an entirely different tribunal.

Mr. WILSON. Then it necessarily follows, if the court has not the right to restrain me from assaulting you because the assault would injure your business interests (and the court assumes that your business interests are a property right) by disabling you from attending to your business interests, then the court would not have the right to restrain me from assaulting you because it would interfere with somebody else's business interests. Labor organizations do not go that far. But I am getting away from the subject that I am to discuss. We believe that those labor organizations should be exempt from the operation of the Sherman antitrust act because it would be for the best interests of the people.

Mr. LITTLEFIELD. I shall have to ask you to excuse me, Mr. Wilson, at this time. It has gotten so late that I shall have to adjourn for this evening. The subcommittee is to hold another hearing during the coming week, and I will be glad to hear you further at that time.

Mr. WILSON. Very well, Mr. Chairman.

(At 4.30 o'clock p. m. the subcommittee adjourned until Thursday, April 30, 1908, at 10 o'clock a. m.)

#### STATEMENT OF MR. SAMUEL GOMPERS.

Mr. GOMPERS. I wanted to say as a preface to my remarks that I doubt whether there is any man in the whole country who may perhaps occupy or receive the attention of our fellow-citizens who is clothed with less power than myself, or any other officer who would occupy the presidency of the American Federation of Labor; for, as a matter of fact, there is not anything that I can say which is binding upon any man, woman, or child in all the United States. There is not an order or direction that I can give or would give or could give that would have the slightest binding effect upon any man, woman, or child in all our country. The unions of the working people of our country are entirely voluntary; the union of unions as represented by our federation is entirely voluntary. There is not an organization affiliated with the American Federation of Labor which is not an absolute entity within itself, with its sovereign power; and, indeed, whatever power may come from any utterance of mine is because I endeavor to express the views of the men and women who are mem-

bers of the labor organizations of the country and because I try faithfully and as intelligently as the light is given me to express those views.

I asked, before Mr. Emery had to leave, that I might have an opportunity to ask him a question or two, which he at the time rightfully declined to be interrupted to answer because he was crowded for time, and immediately upon the conclusion of his statement he was required to leave to make a train. I wanted to ask him whether it was not true—notwithstanding the fact that Senator Edmunds had made the argument that he did in the Senate—that he in the first place extolled the work of the labor organizations and found them necessary? And also whether it is not true that the proviso exempting the labor organizations was adopted by the Senate in the Committee of the Whole, despite Senator Edmunds's position?

Mr. LITTLEFIELD. I will call Mr. Emery's attention to this statement of yours in the record, so that if he has any further statement to make he may make his answer in the record. Will that answer the purpose?

Mr. GOMPERS. Certainly. No one ever questioned the great legal ability of Senator Edmunds, but I think it is not an expression derogatory to his ability when I say that no one ever accused him of being a great economist; and one of the points that he made in the argument read by Mr. Emery clearly demonstrates the statement that so far as economies, social economies, industrial development, and industrial and commercial progress were concerned he was woefully deficient. The very statement that he makes that workmen may increase their wages a dollar a day, and for that reason and that reason alone employers of labor would be prevented from increasing the price of their finished product, that they would be interfered with in doing so, clearly shows this fact, that he did not understand that the whole trend of industrial development meant this, that new machinery, new tools of labor, new devices, new power, were applied to industry with every increase in wages, and that as a matter of fact the increase of wages, say, of a dollar a day, in modern industry did not imply that it meant a dollar a ton increased cost in the finished product.

Mr. LITTLEFIELD. Do you not think that the rate of wages has a direct relation to the cost of the product?

Mr. GOMPERS. Undoubtedly.

Mr. LITTLEFIELD. Well, would not a decrease in the rate of wages tend to decrease the cost of the product?

Mr. GOMPERS. Not necessarily.

Mr. LITTLEFIELD. I say "tend."

Mr. GOMPERS. Not necessarily. As a matter of fact, the very thing that the Senator discussed, in so far as the cost is concerned, has gone on, and, as a matter of fact, notwithstanding that, wages have increased to the dollar-a-day mark, and perhaps more, as understood at the time by Senator Edmunds in his speech, we are still selling the products of higher wage-workers in the United States in the cheapest wage markets of the world.

Mr. LITTLEFIELD. Yes; but take the existing condition of mechanical efficiency, and assume that as a constant factor. What do you say as to whether or not the increase of the wage in that particular

industry without any corresponding development of increased efficiency—whether or not the increase of wage is an industry under those circumstances—would not have a direct tendency to cause an increase in the cost of production?

Mr. GOMPERS. If there were any basis of fact in the question, the answer would be true.

Mr. LITTLEFIELD. Yes.

Mr. GOMPERS. But the one thing is impossible in modern conditions, and the other follows as a result.

Mr. LITTLEFIELD. Do you go so far as to wish to be understood that that is an inevitable law, or that that is a general result?

Mr. GOMPERS. It is an inevitable law of industry. The new machine, the new thought, the new tool, the new device, must find its opportunity for acceptance and introduction, and the opportunity is the necessity which brings forth the application of the new tool, the new machine, and the new device.

Mr. LITTLEFIELD. Quite true; but if you get the increased efficiency of your machinery, and you do not get, right along with that, an increase in the cost of wages, you will necessarily get a reduction of the cost of production, will you not?

Mr. GOMPERS. I do not think I understand your question.

Mr. LITTLEFIELD. I say, if you get increased efficiency in your machinery, and do not follow that with an increase in the rate of wage, you necessarily get a decrease in the cost of production. Do I make that clear?

Mr. GOMPERS. That depends upon an entirely different proposition.

Mr. LITTLEFIELD. It seems to me one is related to the other. I would be glad to hear you on that.

Mr. GOMPERS. There are many people intelligent in everything except their lack of understanding as to the development of industry. There are some who say, for instance, that, after all, the cost price of a thing depends upon supply and demand, and when the demand for a thing increases the price must necessarily go up. If the demand is reduced, or is not general, then the price of the article decreases. That may be true in so far as inanimate things are concerned, natural conditions, normal conditions into which labor—into which industry—does not enter, or into which ingenuity can not enter; but in so far as the production of wealth is concerned, in so far as industry is concerned, it is often the very reverse; for, as a matter of fact, as soon as the demand for a thing becomes greater and more general, the process of manufacture, the process for the production of the thing, accelerates by new devices and new methods and machines.

Mr. LITTLEFIELD. And increasing in supply.

Mr. GOMPERS. And increasing in supply to satisfy the demand, and the prices go down.

Mr. LITTLEFIELD. But if you did not happen to get an increase in the supply, you would probably get an increase in the price if the demand increased?

Mr. GOMPERS. Yes, sir; but that is not in the nature of industry.

Mr. LITTLEFIELD. In other words, you say that is not the rule.

Mr. GOMPERS. It is not the rule.

Mr. LITTLEFIELD. Your idea is that that is not in accordance with human experience?

Mr. GOMPERS. Yes; that is my position. Now, I do not know that it is necessary to enter into that more fully. I simply want to dissent from the opinion expressed by Senator Edmunds at the time and repeated approvingly by Mr. Emery this afternoon. I wanted to inquire, since Mr. Emery had quoted, and I thought approvingly, the amendment which Senator Hoar proposed to the House bill, whether it would commend itself to his favorable consideration. I would like to have known what Mr. Emery's views were in so far as that is concerned. He quoted Senator Hoar's amendment as a substitute for the House proposition in reference to the organizations of labor, and I was under the impression that because he made no comment either one way or another, but inasmuch as he quoted it in opposition to the amendment passed by the House to its bill, that he would favor that proposition. I would like to have known his position on that.

Mr. LITTLEFIELD. Would you favor it?

Mr. GOMPERS. I had not had a chance to examine it. I only wanted to know his opinion.

Mr. LITTLEFIELD. You would not want to express an opinion upon it without having a chance to examine?

Mr. GOMPERS. I simply wanted to know his opinion.

Mr. LITTLEFIELD. I see.

Mr. GOMPERS. You will remember that I made some remark in a way, referring to any proposition that labor might offer, whether it might be simply made—

Mr. LITTLEFIELD. I understand. I did not know whether that proposition was submitted by the labor interests. It was rather a proposition submitted by Senator Hoar and may not have been inspired or submitted by any representative of labor organizations.

Mr. GOMPERS. Yes. I think that if the arguments that were made by Senator Hoar and other Senators when this present law was under consideration by the Senate as a bill, particularly that to which Mr. Emery referred rather than read and then read from in extenso from the arguments against, some more light might be thrown on the attitude of mind of the Senators when that bill was under consideration.

Mr. LITTLEFIELD. Mr. Emery's proposition, I think, is that after Mr. Edmunds made his statement which Mr. Emery quoted from quite extensively no discussion on that particular subject occurred in either body.

Mr. GOMPERS. Yes; but the proviso exempting the labor organizations was adopted.

Mr. LITTLEFIELD. No; the proviso exempting the labor organizations, if I remember his historical statement of the legislation, was adopted before Senator Edmunds made his statement and in the Committee of the Whole.

Mr. GOMPERS. Yes.

Mr. LITTLEFIELD. But when the bill was reported from the Committee of the Whole to the Senate an amendment relative to labor organizations was appended.

Mr. GOMPERS. Yes.

Mr. LITTLEFIELD. The bill with that amendment was referred to the Judiciary Committee, of which Senator Edmunds was chairman.

out of which came the existing Sherman antitrust act; and Senator Edmunds's speech was made after the action of the Committee of the Whole adopting the amendment, if I explain it right.

Mr. GOMPERS. Mr. Emery said that there was not a proposition came before the Senate or the House reviving the exemption; and that is true. That is, so far as that bill was under consideration, that is true. I think I said—and if I did not say it in my first statement I want to say it now—that the only reason that such a direct amendment was not proposed in either the Senate or the House was because the Senators and some Members of the House assured the representatives of labor that under no circumstances was it the intention of the committee that the labor organizations should be included, and that under no construction of the court could the labor organizations be included.

Mr. LITTLEFIELD. You stated that in your previous statement, and Mr. Emery called attention to that in the opening of his remarks before you came in. He quoted practically your statement in full.

Mr. GOMPERS. Let me say that I believe it was in 1883 that the Senate authorized the Committee on Education and Labor to undertake an extensive investigation as to the cause of the industrial depression, the large number of workers unemployed, strikes, and other disturbances, lockouts and other disturbances, and to report. During that period I was thrown in frequent contact—or, at least, I was in attendance in the Senate Committee on Education and Labor very, very frequently.

Mr. LITTLEFIELD. Was that a committee on the part of the Senate or on the part of the House?

Mr. GOMPERS. On the part of the Senate—the Senate Committee on Education and Labor. The investigation lasted, I should think, over a year, anyway. I frequently saw and was in communication with Senators; I testified in extenso before the committee, and I think that I have a right to say, without vanity, that I received every courtesy at the hands of not only the committee as a whole, but the members of the committee, and very cordial—I will not say friendly, but very cordial—relations resulted. Senator George became an absolute convert to the cause which organized labor represents. That was his amendment. Several other Senators were in entire accord with us. When this bill was under consideration by the Senate, with others I frequently had opportunities to meet, and did meet, with these gentlemen, and discussed the matter, and I expressed my fears; and it was because of that that Senator George, in consultation with others and myself, drafted the amendment which was adopted by the Senate.

Mr. LITTLEFIELD. Was that introduced by Senator George? I do not remember about that.

Mr. GOMPERS. Senator Sherman, rising in the Senate, stated that he incorporated in the bill the proviso prepared and submitted by Senator George, of Mississippi. You will find that in the Record. Frequently I expressed my apprehension when that bill was reconstructed, and the Senators informed me and spoke to me of it and quieted my fears; I am free to say they never entirely dissipated them. I say this because I speak from the intimate knowledge of these men's faithfulness to the views they expressed and their intention not to include the labor organizations in that bill. No man—not even

courts—in speaking of the discussions on the bill will say that the original intention was to include the labor organizations. The Sherman antitrust act came as a result of a feeling among the people that these great corporations were throttling them, were injuring their business, were invading their rights and their interests, and it was with that object in view that there came up a demand from the people of the country for some sort of legislation that would hold them in check. But through that entire discussion, whether on platform, or through the press, you will fail to find one demand that the organizations of labor be included in such legislation.

Mr. DAVENPORT. Do you recall whether Justice White was a member of the Senate in 1890?

Mr. GOMPERS. I can not say. My memory does not serve me.

Mr. DAVENPORT. In his dissenting opinion in the Trans-Missouri Traffic Association case he said that in the Debs case it was held in the lower court that the Sherman antitrust act applied to organizations of labor; and speaking of that case he said, "This was not doubted by any member of this court." I was wondering whether or not Justice White himself was a member of the Senate at that time.

Mr. GOMPERS. I can not remember. I think Senator Eustis was a member at that time.

Mr. DAVENPORT. Mr. Justice White said, as you will see if you will examine the dissenting opinion in the Trans-Missouri Association case, referring to the decision of the Supreme Court in the Debs case and the decision in the court below, that it was held that this was to apply to labor unions, and he said: "This view was not doubted by this court."

Mr. GOMPERS. I do not think that any man is justified in accusing me of saying, or interpreting any statement I have made to say, that, because of the good things done and achieved, and the beneficial results accomplished by the labor organizations, therefore they are to be permitted to do evil and the unlawful things. I am sure that that is a very strange inference to draw from my utterances.

Mr. DAVENPORT. The remark of Mr. Justice White, which I called attention to, is to be found on page 356 of 166 U. S. This is in 1896, in the case of the United States *v.* The Freight Association. He says:

It has been held in a case involving a combination among workingmen that such combinations are embraced in the act of Congress in question, and this view was not doubted by this court. (In re Debs, 64 Fed. Rep., 724, 745-755; 158 U. S., 564.)

Mr. WILSON, of Pennsylvania. Is it not a fact that the Debs case included not only a consideration of the Sherman antitrust act, but also the destruction of the mails?

Mr. DAVENPORT. Yes; but I understand from Mr. Fuller here that Mr. Justice White was a Senator of the United States when the Sherman antitrust act was passed, and in his dissenting opinion in the case of the United States *v.* The Freight Association, in 166 U. S., in advocating the idea that this should be confined to contracts only in unreasonable restraint of trade, he said at page 356:

The construction now given us, I think, strikes down the interest of the many to the advantage and benefit of the few. It has been held, in a case involving a combination among workingmen, that such combinations are embraced in the act of Congress in question, and this view was not doubted by this court. (In re Debs, 64 Fed. Rep., 724, 745-755; 158 U. S., 564.)

Mr. FULLER. But that does not refer to his opinion as a Senator.

Mr. DAVENPORT. Oh, no. My inquiry was elicited by the inquiry of Mr. Gompers as to what the Senators understood, and it so happened that he was then a Senator. He has since become a justice of the Supreme Court, and in passing upon this question he used that language.

Mr. GOMPERS. That does not disprove the statement, nor does it cast any doubt upon the statement I make, that the Senators whom I have named and to whom I have referred gave me their positive assurance and gave that positive assurance to others.

Mr. DAVENPORT. Oh, no.

Mr. GOMPERS. You will note that in the arguments as well as in the discussions that have been read to you which occurred in the Senate, and you will find it also in the opinions of the courts, there is that very error to which I called attention—that is, that common error into which we have all fallen, of speaking of labor and capital as if labor was some inanimate thing, without life. I do not want to enter into a discussion of it, nor to say more than this—

Mr. LITTLEFIELD. You have not anything at your hand there that will indicate where in the Record the amendment that was adopted by the Senate in Committee of the Whole will be found?

Mr. GOMPERS. I have not. You will find it, I think, in the remarks of Senator Sherman. He made the remark, substantially, "I think that now all of us should be satisfied." That was when he accepted for the committee the proviso of Senator George.

Mr. Chairman, let me say, as I stated the last time I had the pleasure of meeting the committee, that we have found it necessary to have the amendment which was submitted to the consideration of the committee as an amendment to the Hepburn bill, the amendment which we believe ought to be adopted. It was introduced by Mr. Wilson, a Member in Congress from Pennsylvania, and is known as H. R. 20584.

Mr. LITTLEFIELD. That is the amendment you suggest to the Hepburn bill, provided the Hepburn bill becomes a law?

Mr. GOMPERS. We suggest this as an amendment to the Sherman antitrust act.

Mr. LITTLEFIELD. Oh, yes.

Mr. GOMPERS. I do not want, either by direction or indirection, to withdraw whatever support I may be enabled to give to the Hepburn bill in so far as it applies to the corporations and associations for profit and owning capital stock and to the common carriers, but in so far as it applies to labor organizations under the terms of corporations or associations not for profit and without capital stock we ask for the elimination of those features of the bill, and that our bill may become either an amendment to the Hepburn bill in the amended form, as I have suggested, or that this bill, H. R. 20584, may be enacted as a separate bill.

Mr. LITTLEFIELD. An independent proposition?

Mr. GOMPERS. Yes.

Mr. LITTLEFIELD. You do not want to alter your attitude in relation to the Hepburn bill? You do not want to be understood as antagonizing that by this bill, although, if the Hepburn bill goes, you would like to have this as an amendment to it; or in default of the Hepburn



bill passing, you would like to have this enacted as an independent proposition standing alone; do I get that right?

Mr. GOMPERS. Yes. I would like to have this bill incorporated in the hearing here.

Mr. LITTLEFIELD. Very well.

(The bill referred to is as follows:)

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A BILL to regulate commerce among the several States or with foreign nations, and to amend the act approved July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section seven of the act approved July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," be, and the same is hereby, amended so as to read as follows:*

"SEC. 7. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

SEC. 2. That in any suit for damages under section seven of the said act approved July second, eighteen hundred and ninety, based upon a right of action accruing prior to the passage of this act, the plaintiff shall be entitled to recover only the damages by him sustained and the costs of suit, including a reasonable attorney's fee; and no suit for damages under said section seven of the said act, based upon a right of action accruing prior to the passage of this act, shall be maintained unless the same shall be commenced within one year after the passage of this act.

SEC. 3. Nothing in said act approved July second, eighteen hundred and ninety, or in this act, is intended, nor shall any provision thereof hereafter be enforced so as to interfere with or to restrict any right of employees to strike for any purpose not unlawful at common law or to combine or to contract with each other or with employers for the purpose of obtaining from employers peaceably or by any means not unlawful at common law satisfactory terms for their labor or satisfactory conditions of employment, or so as to interfere with or to restrict any right of employers for any purpose not unlawful at common law to discharge all or any of their employees or to combine or to contract with each other or with employees for the purpose of obtaining labor on satisfactory terms, peaceably or by any means not unlawful at common law.

SEC. 4. *That the said act, approved July second, eighteen hundred and ninety, is hereby further amended by adding at the end of said act the following sections:*

"SEC. 9. *That any corporation or association which may be subject to this act but not subject to the act approved February fourth, eighteen hundred and eighty-seven, entitled 'An act to regulate com-*

*merce,' or the acts amendatory thereof or supplemental thereto, shall be entitled to the benefits and immunities in this act hereinafter given, if and when it shall register as herein provided, and shall comply with the requirements of this act hereinafter set forth, but not otherwise.*

"Such registration by a corporation or association for profit and having capital stock may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth such information concerning the organization of such corporation or association, its financial condition, its contracts, and its corporate proceedings as may be prescribed by general regulations from time to time to be made by the President pursuant to this act; and such registration by a corporation or association not for profit and without capital stock may be effected by filing with the Commissioner of Corporations a written application therefor, together with a written statement setting forth, first, its charter or agreement of association and bylaws; second, the place of its principal office, and, third, the names of its directors or managing officers and standing committees, if any, with their residences.

"Thereupon the Commissioner of Corporations shall register such corporation or association under this act. In case any corporation or association so registered shall refuse or shall fail at any time to file the statements or to give the information required under this act, or to comply with the requirements of this act, or in case information furnished by it shall be false in any material particular, the Commissioner of Corporations shall have power to cancel the registration of such corporation or association after thirty days' notice in writing to such corporation or association. Any corporation or association aggrieved by such action of the Commissioner of Corporations may apply to the supreme court of the District of Columbia, in a suit or proceeding in equity, for review of such action and such relief in the premises as may be proper, and said court shall have jurisdiction to hear and determine such application and to affirm, reverse, or modify such action of said Commissioner, subject to appeal as in other causes in equity.

"SEC. 10. That the President shall have power to make, alter, and revoke, and from time to time, in his discretion, he shall make, alter, and revoke regulations prescribing what facts shall be set forth in the statements to be filed with the Commissioner of Corporations by corporations and associations for profit and having capital stock, applying for registration under this act, and what information thereafter shall be furnished by such corporations and associations so registered, and he may prescribe the manner of registration and of cancellation of registration..

"Nothing in this act shall require the filing of contracts or agreements of corporations or associations not for profit or without capital stock, and such corporations and associations, while registered hereunder, and the members thereof, shall be entitled to all the benefits and immunities given by this act excepting such as are given by section eleven and section twelve, without filing such contracts or agreements; but from time to time every such corporation or association shall file with the Commissioner of Corporations, when and as called for by him, a revised statement giving, as of a date specified by him, such information as is required to be given at the time of original registration, under section nine of this act.

"SEC. 11. That any corporation or association registered under this act, and any person not a common carrier under the provisions of the said act approved February fourth, eighteen hundred and eighty-seven, or the acts amendatory thereof or supplemental thereto, being a party to a contract or combination hereafter made other than a contract or combination with a common carrier filed under section twelve of this act, may file with the Commissioner of Corporations a copy thereof, if the same be in writing, or if not in writing, a statement setting forth the terms and conditions thereof, together with a notice that such filing is made for the purpose of obtaining the benefit of the provisions of this section.

*"No prosecution, suit, or proceeding by the United States shall be begun under the first six sections of this act for or on account of any such contract or combination hereafter made, of which a copy or written statement shall have been filed as aforesaid, or for or on account of any acts done in performance thereof by or in behalf of such corporation, association, or person, unless such contract or combination shall be in unreasonable restraint of trade or commerce, as defined in section three of this act, or shall constitute a conspiracy in violation of section one or of section three of this act, or shall be in violation of section two of this act. If in the opinion of the Commissioner of Corporations any such contract or combination of which a copy or a written statement shall have been filed as aforesaid shall be in unreasonable restraint of trade or commerce, as defined in section three of this act, or shall constitute a conspiracy in violation of section one or of section three of this act, or shall be in violation of section two of this act, said Commissioner shall be authorized and empowered, and it shall be his duty, to enter an order to that effect, which order shall set forth briefly the grounds upon which it is based. Any such order may be made by the Commissioner upon his own motion and without notice or hearing within thirty days from the date of the filing of such contract or written statement. After the expiration of such thirty days no such order shall be made by the Commissioner except after notice to the party or parties who filed such contract or written statement and after giving such party or parties an opportunity to be heard, and such order shall take effect upon a date therein to be specified not less than ten days after the filing thereof; but any person aggrieved by such action of the Commissioner of Corporations, or the United States in case of his nonaction, may apply to the Interstate Commerce Commission for a rehearing of the case; and said Commission (with which the Commissioner of Corporations is hereby authorized to sit for the purpose of such rehearing with the powers and duties of a member) is hereby authorized and directed, after due motion to rehear such case and thereupon to enter such order in the case as seems to it proper, subject, as in other instances, to appeal to the courts as hereinafter provided. If any party or parties to any such contract or combination, of which a copy or a written statement shall have been filed as aforesaid, shall do any act in performance of such contract or in pursuance of such combination after the Commissioner of Corporations or the Interstate Commerce Commission shall have entered an order as aforesaid, such party or parties, unless such order of the Commissioner on the rehearing hereinbefore provided shall have been replaced by a new order or such order shall have been*

*suspended or set aside by order of the court, as herein provided, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or both said punishments; and the United States may institute and maintain proceedings in equity under section four of this act to prevent and restrain the performance of such contract and the continuance of such combination and any action pursuant thereto in violation of this act.*

*"No corporation or association authorized to register under section nine of this act shall be entitled to the benefit of this section if it shall have failed so to register or if the registration of such corporation or association shall have been canceled; and the United States may institute, maintain, or prosecute a suit, proceeding, or prosecution under the first six sections of said act for or on account of any such contract or combination hereafter made of which a copy or written statement shall not have been filed as aforesaid or as to which an order shall have been entered as above provided.*

*"Any party affected by any such order entered by the Commission may institute and maintain a suit to enjoin, set aside, annul, or suspend such order in the supreme court of the District of Columbia, and jurisdiction is hereby given to such court to hear and determine such suits and to grant such relief; but no interlocutory order or decree enjoining, setting aside, annulling, or suspending any such order of the Commission shall be granted except after not less than five days' notice to the Commission. The provisions of 'An act to expedite the hearing and determination of suits in equity, and so forth,' approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.*

*"No corporation or association for profit or having capital stock, and registered under this act, that hereafter shall make a combination or consolidation with any other corporation or association, shall be entitled to continue its registration under this act, unless without delay it shall file with the Commissioner of Corporations, pursuant and subject to the provisions of this section, a statement setting forth the terms and conditions of such combination or consolidation, together with a notice as hereinabove provided.*

*"SEC. 12. That any common carrier under the provisions of the said act approved February fourth, eighteen hundred and eighty-seven, or the acts amendatory thereof or supplemental thereto, being a party to a contract or combination in the nature of a traffic agreement, but not including pooling of freight or earnings, hereafter made as forbidden by section five of the said act approved February fourth, eighteen hundred and eighty-seven, or any other party to such contract or combination, may file with the Interstate Commerce Commission a copy thereof, if the same be in writing, or, if not in writing, a statement setting forth the terms and conditions thereof, together*

with a notice that such filing is made for the purpose of obtaining the benefit of the provisions of this section.

*"No prosecution, suit, or proceeding by the United States shall be begun under the first six sections of this act or on account of any such contract or combination hereafter made of which a copy or written statement shall have been filed as aforesaid, or for or on account of any acts done in performance thereof by or in behalf of such corporation, association, or person, unless such contract or combination shall be in unreasonable restraint of trade or commerce as defined in section three of this act, or shall constitute a conspiracy in violation of section one or of section three of this act, or shall be in violation of section two of this act. If in the opinion of the Interstate Commerce Commission any such contract or combination of which a copy or a written statement shall have been filed as aforesaid shall be in unreasonable restraint of trade or commerce as defined in section three of this act, or shall constitute a conspiracy in violation of section one or of section three of this act, or shall be in violation of section two of this act, said Commission shall be authorized and empowered and it shall be its duty to enter an order to that effect, which order shall set forth briefly the grounds upon which it is based. Any such order may be made by the Commission, upon its own motion and without notice or hearing, within thirty days from the date of the filing of such contract or written statement. After the expiration of such thirty days no such order shall be made by the Commission except after notice to the party or parties who filed such contract or written statement and after giving such party or parties an opportunity to be heard, and such order shall take effect upon a date therein to be specified not less than ten days after the filing thereof; but any person aggrieved by such action of the Interstate Commerce Commission, or the United States in case of its nonaction, may apply to the supreme court of the District of Columbia for review of the case; and said court is hereby authorized and directed to hear and determine such application and to affirm, reverse, or modify such action, or in case of its failure to act to enter such order in the case as seems to it proper, subject as in other instances to the provisions of section eleven and to appeal to the Supreme Court of the United States as herein provided.*

*"If any party or parties to any such contract or combination, of which a copy or a written statement shall have been filed as aforesaid, shall do any act in performance of such contract or in pursuance of such combination after the Commissioner of Corporations for the Interstate Commerce Commission shall have entered an order as aforesaid, such party or parties, unless such order of the Commission shall have been enjoined, annulled, or suspended by a decree or order of a court, as herein provided, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or both said punishments, in the discretion of the courts; and the United States may institute and maintain proceedings in equity under section four of this act, to prevent and restrain the performance of such contract and the continuance of such combination and any action pursuant thereto in violation of this act.*

*"No corporation or association authorized to register under section nine of this act shall be entitled to the benefit of this section if it*

*shall have failed so to register, or if the registration of such corporation or association shall have been canceled; and the United States may institute, maintain, or prosecute a suit, proceeding, or prosecution under the first six sections of said act for or on account of any such contract or combination hereafter made, of which a copy or written statement shall not have been filed as aforesaid, or as to which an order shall have been entered as above provided."*

SEC. 5. That no suit or prosecution by the United States under the first six sections of the said act approved July second, eighteen hundred and ninety, shall hereafter be begun for or on account of any contract or combination made prior to the passage of this act, or any action thereunder, unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations; and no suit or prosecution by the United States under the first six sections of the said act approved July second, eighteen hundred and ninety, shall be begun after one year from the passage of this act for or on account of any contract or combination made prior to the passage of this act, or any action thereunder; but no corporation or association authorized to register under section nine of the said act approved July second, eighteen hundred and ninety, as amended, shall be entitled to the benefit of the provisions of this section, if it shall have failed so to register, or if the registration of such corporation or association shall have been canceled before the expiration of one year after such registration, exclusive of the period, if any, during which such cancellation shall have been stayed by an order of the Interstate Commerce Commission or an order or decree of court subsequently vacated or set aside. Anything herein contained to the contrary notwithstanding, all actions and proceedings now or heretofore pending under or by virtue of any provision of the said act approved July second, eighteen hundred and ninety, may be prosecuted and may be defended to final effect; and all judgments and decrees heretofore or hereafter made in any such actions or proceedings may be enforced in the same manner as though this act had not been passed.

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MR. JENKS. I am glad that Mr. Davenport raises that question in this connection, because it brings up what Mr. Low said, and what I should like to emphasize, and that has affected really the trend of the whole discussion. The Civic Federation, which has promoted this bill, brought this forward, because, as was said before, there seemed to be a very strong demand for an amendment along some such general line as this by varieties of interests of all kinds in the country. The committee has worked on it as faithfully as it could, and it has thought that on the whole this kind of an act would be serviceable to the country; but we have no pride in any specific words that have been used. It has been very helpful to us to have the criticism which has been given to the bill. As you know, we have the opinion of Mr. Smith on the one hand, and, in regard to the general principle, we think something ought to be done along this line, and this is the clearest and best view of the matter. On the other hand, the opponents of the bill, and very naturally, have attacked the specific

words of the bill here and there, which might be very well; but the whole line of presentation has been on the line of public policy, with here and there an exception. The whole line of attack has been one of technical attack on the details of the bill, and it has been natural enough, so that we can not exactly join issue, as I should like to if I knew enough, or if you knew enough.

Less me pass for the time the question of reasonableness and take up another question. It has been suggested that the duties of the Commissioner of Corporations were arbitrary; that he was to make arbitrary rules; that he was practically determining contracts, and all that sort of thing. I simply wish to repeat what was said before, with some emphasis, that the sole power of the Commissioner of Corporations is to determine the nature of the proof that must be made by the Attorney-General if he brings a suit.

Mr. DAVENPORT. Oh, no; not under the amended law. If it is convenient for the committee and the professor, permit me to read this astounding scheme.

Mr. LITTLEFIELD. What page are you reading from?

Mr. DAVENPORT. I commence on page 5.

Mr. SCHULTEIS. Has that specific amendment been brought in?

Mr. LITTLEFIELD. It has been before the subcommittee for several days.

Mr. DAVENPORT. This reads:

No prosecution, suit, or proceeding by the United States shall be begun under the first six sections of this act for or on account of any such contract or combination hereafter made of which a copy or written statement shall have been filed as aforesaid, or for or on account of any acts done in performance thereof by or in behalf of such corporation, association, or person, unless such contract or combination shall be in unreasonable restraint of trade or commerce as defined in section 3 of this act.

Section 3 of this act means the original antitrust act. It relates to the District of Columbia.

This draft reads further:

Or shall constitute a conspiracy in violation of section 1 or of section 3 of this act, or shall be in violation of section 2 of this act.

Now follows this most remarkable proposition:

If in the opinion of the Commissioner of Corporations any such contract or combination, of which a copy or a written statement shall have been filed as aforesaid, shall be in unreasonable restraint of trade or commerce, as defined in section 3 of this act, or shall constitute a conspiracy in violation of section 1 or of section 3 of this act, or shall be in violation of section 2 of this act, said Commissioner shall be authorized and empowered, and it shall be his duty to enter an order to that effect, which order shall set forth briefly the grounds upon which it is based. Any such order may be made by the Commissioner upon his own motion, and without notice or hearing, within thirty days from the date of the filing of such contract or written statement. After the expiration of such thirty days no such order shall be made by the Commissioner except after notice to the party or parties who filed such contract or written statement, and after giving such party or parties an opportunity to be heard, and such order shall take effect upon a date therein to be specified, not less than ten days after the filing thereof; but any person aggrieved by such action of the Commissioner of Corporations, or the United States, in case of his nonaction, may apply to the Interstate Commerce Commission for a rehearing of the case.

Then follows this provision:

If any party or parties to any such contract or combination, of which a copy or written statement shall have been filed as aforesaid, shall do any act in performance of such contract or in pursuance of such combination after the Com-

missioner of Corporations or the Interstate Commerce Commission shall have entered an order as aforesaid, such party or parties, unless such order of the Commissioner on the rehearing hereinbefore provided shall have been replaced by a new order, or such order shall have been suspended or set aside by order of the court as herein provided, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or both said punishments; and the United States may institute and maintain proceedings in equity under section 4 of this act, to prevent and restrain the performance of such contract and the continuance of such combination, and any action pursuant thereto in violation of this act.

In other words, the Commissioner, either on his own motion or *ex parte* or after hearing, can make that order, and if that order stands, any person that violates it is guilty of a misdemeanor and is liable to \$5,000 fine and a year's imprisonment; and I want to know whether Professor Jenks thinks that any such legislation as that is proper, much less, we will say, constitutional?

Mr. JENKS. You put in, I may state, a very important qualification when you say "if it stands." There is a full opportunity for hearing upon appeal to the court.

Mr. DAVENPORT. On the question as to whether or not that order is to stand?

Mr. JENKS. Yes.

Mr. DAVENPORT. Now, you have this case. Under the terms of the Sherman antitrust act he would be liable to prosecution, and then he is liable to a prosecution further if he violates the order of the Commissioner. Mr. Low said you would explain all this; he could not wait; he had to take the train. Can you explain to us what they were driving at in getting up such an arrangement as that?

Mr. LITTLEFIELD. Your proposition is that if it is unreasonable they are subject to the penalties of the Sherman antitrust act, and in addition thereto they are subject to an additional penalty for the violation of this order, if it is sustained; that is the suggestion?

Mr. DAVENPORT. The suggestion? That is the express language of it.

Mr. LITTLEFIELD. We are going to hear from the Professor on this now.

Mr. JENKS. The point of that is that after an appeal, if they go ahead in violation of that order, they will be subject to a penalty.

Mr. LITTLEFIELD. They would be subject to two punishments. They would be subject to the other punishment if the order is sustained.

Mr. DAVENPORT. If the opinion of Herbert Knox Smith is that an action is in violation of an order which he has made, the person can be punished for that. If in his opinion there is a violation of any of these provisions, he can make this order.

Mr. LITTLEFIELD. That depends on whether the contract or combination is in unreasonable restraint of trade; if he holds that the agreement is in violation of any of these sections—

Mr. JENKS. I do not so understand it.

Mr. EMERY. In other words, after being deemed guilty, he is then tried.

Mr. LITTLEFIELD. The amendment provides that if he proceeds to do the act which the Commissioner of Corporations has held to be in violation of the statute, the doing of that act, after that finding of



the Commissioner, shall subject him to this penalty. That is the way you understand it, is it not?

Mr. JENKS. I was going to call attention to a different opinion from that. Standing alone, without qualifications—as the act is now, it reads in this way:

If the contract or combination of which a copy or a written statement shall have been filed as aforesaid shall be in restraint of trade or commerce.

The “restraint of trade or commerce” does not have the word “unreasonable” in it.

Mr. DAVENPORT (reading): “Or shall constitute a conspiracy under section 3 or in violation of section 2.”

Mr. JENKS. The word “conspiracy” appears here, which brings up the same thought that has been suggested before, that the word “conspiracy” itself implies an unlawful act.

Mr. DAVENPORT. You create an official here and give him power to say that a certain contract or combination or arrangement made between business men is in violation of the Sherman antitrust act, and he makes an order, and when that order is made, then any contravention of that order renders the party liable to imprisonment or a fine, or both. Now, this was not in the original bill as proposed here. This crept in here after these long discussions, and there was nothing that occurred here in the discussions that would provoke any such provision as this. Mr. Low intimated on the last day he was here that we were too suspicious, and that we were too inquisitive to know what purpose there was in these things. It would look to me on the face of it as if it was an attempt on the part of somebody to get his grip upon the great industries and businesses of this country for the purpose of hammering them into submission to his will. That is what it looks to me like, for I can not understand what object there could be for people to create an inferior official of the Federal Government and give him power to declare that the business of this country must be done under his orders under the penalties of imprisonment and fine. I can not conceive of any other purpose in it. There is nothing that has been said heretofore, nothing in the discussions here, which has caused that to appear. Now, can we find out who drew that provision?

Mr. JENKS. Which part of it?

Mr. DAVENPORT. This part of it we are referring to.

Mr. JENKS. The only answer that would be fair to be made to that is that the Commissioner of Corporations had nothing to do with that section, and so far as I know never saw it. That I will say in answer to your implication and to Mr. Low's suggestion that you seem to think there is reason to suspect.

Mr. DAVENPORT. We finally found out that those provisions that were most obnoxious to us, those that took out from under the operation of this law the boycott in all its offensive forms, were drawn by Mr. Stetson, who represented the United States Steel Corporation, and Mr. Morawetz, who represented the railroads. We ascertained the other day that they drew that provision which strikes down the Loewe case and all the other cases that we have at last got established. Now, I would like to know who it is that drew this. Can we not get any such information?

Mr. JENKS. I think not. I have given you some negative information in reply to a charge that was most unjust.

Mr. DAVENPORT. What?

Mr. JENKS. In the tendency and the implication of it; that was that the Commissioner of Corporations, you were implying, was attempting to seize all this power. And he did not see the section, and he certainly had nothing to do with it.

Mr. DAVENPORT. I do not say that the Commissioner of Corporations was attempting to seize that power, but if it was the Czar of Russia he could not have designed the thing better.

Mr. JENKS. May I say a word further in reference to that matter? It is a desirable thing, ordinarily, to see to it that a proceeding along legal lines is orderly, with proper appeal. The sole effect of that, as I see it, is this, that the order of the Commissioner of Corporations shall stand until it is set aside, and full provision is made for it to be set aside promptly, in an orderly way, first by a rehearing with the Commissioner and Interstate Commerce Commission, and afterwards by an appeal to the court; and as long as anything is pending in that way, there is no penalty that stands against it. It is simply that if a person goes ahead attempting to override in a lawless way an order of this kind, he gets this penalty, and he ought to get it. It is simply an attempt to override an order in an illegal way that brings a penalty, and nothing more.

May I now take up one other point for a moment?

Mr. EMERY. Do you not assume that the existing law that still stands would be operative?

Mr. JENKS. I do not understand.

Mr. EMERY. You have repeated that you do not mean to change the existing law, and when the Commissioner decides this contract or combination to be in restraint of trade, the existing law applies to it. The first six sections of the Sherman antitrust act stand, and you have to-day another offense in violation of the order of the Commissioner, in addition to that in the existing law.

Mr. JENKS. That penalty, I should say, is for the violation of the Commissioner's order.

Mr. EMERY. There is one penalty in existence already. This man is liable to prosecution under any one of the first six sections of the Sherman antitrust act for a combination in restraint of trade, it does not make any difference whether it is reasonable or unreasonable. But here now the Commissioner has declared it unreasonable, and you have another offense, namely, violation of the Commissioner's judgment, and a man, after being deemed guilty, is then tried.

Mr. DAVENPORT. No.

Mr. EMERY. That is, not being guilty, he shall have a certain penalty.

Mr. JENKS. If the order is made, it is to be carried out in an orderly way until it is decided whether the order is wrong or not. That is true.

Mr. DAVENPORT. You have been a regular attendant on these meetings. Was that inserted in response to any suggestion of anybody here that there ought to be any such amendment?

Mr. JENKS. I think not.

Mr. DAVENPORT. And you can not vouchsafe to us any information as to the persons or the agencies who originated and inserted in this bill an idea that alters so entirely the whole scope of this law?

Mr. JENKS. I can not.

Mr. EMERY. You know who was the author of the idea, quite apart from the language?

Mr. JENKS. That is something I shall have nothing to say on at all. I say that in my belief the Commissioner of Corporations had nothing to do with either the idea or the language, nor did anybody connected with the administration.

Mr. LITTLEFIELD. You mean as to this particular section?

Mr. JENKS. Yes.

Mr. LITTLEFIELD. I understood the Commissioner to state before us the other day that he was consulted about this act and, I think, about the amendments, so far as it related to his office.

Mr. JENKS. He was consulted about the act.

Mr. LITTLEFIELD. The amendment as regards this particular provision?

Mr. JENKS. As regards this particular provision that Mr. Davenport has called our attention to, so far as my knowledge goes, and I thought it was pretty complete on that subject, the Commissioner of Corporations did not suggest the idea, nor any person connected with the administration—did not draft it. I am very certain of that, and I was not aware that he knew of it.

Mr. LITTLEFIELD. I do not think his attention was specifically called to it.

Mr. JENKS. Before this amendment was brought in I think neither the Commissioner of Corporations nor anyone else connected with the administration had anything to do with this. Further than that I do not want to say anything here. There are some words, but those words have no bearing whatever on this, which Mr. Low and I are responsible for—a few of them.

Mr. DAVENPORT. Again, who will explain to us the standard that is set up now? I was very interested in reading this when I got it. I said, "At last I have got my standard that I have been asking for." This passage reads as follows:

If, in the opinion of the Commissioner of Corporations, any such contract or combination of which a copy or written statement shall have been filed as aforesaid shall be in unreasonable restraint of trade or commerce as defined in section 3 of this act.

Then I thought at first that there must be some definition here in the proposed bill, in section 3, to set up the standard; but it was not there, and upon examining this bill, I find that section 3 is the original Sherman Act. "As defined in section 3 of this act," it says, and section 3 of this act relates to the District of Columbia, and its language is the same as that of the first section:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia.

The point is here, in these words:

Unless such contract or combination \* \* \* shall be in unreasonable restraint of trade or commerce as defined in section 3 of this act.

I take it, in view of the criticism that has been made heretofore upon the proposed bill, that he left out all things pertaining to the

District of Columbia, and attention having been called to that part of it they concluded that they would take out of the operation of this bill everything that pertained to the District of Columbia or its relations to the rest of the country, as is provided for. Let me read what that section is.

Mr. LITTLEFIELD. Does the language of this act relate to the Sherman antitrust act or does it relate to this bill?

Mr. DAVENPORT. This proposed bill has been recast, and if you will observe it is entitled: "A bill to regulate commerce among the several States or with foreign nations, and to amend the act approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraint and monopolies.'"

It begins as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7 of the act approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" be, and the same is hereby, amended so as to read as follows:*

Mr. LITTLEFIELD. Yes; section 11 here is made a new section and treated as if it were a part of the original act in the language in the bill.

Mr. DAVENPORT. This is in order to get at their purpose.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. It is perfectly apparent that section 3 of this act, which I have been reading, refers to this:

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

At first it would not appear what they were driving at in making this change, but you will recall that I drew attention to the fact that the original printed bill, the proposed bill, the Hepburn bill, absolutely ignored everything pertaining to the District of Columbia, everything pertaining to monopolies, and everything pertaining to the Territories, and you know it was in that connection that I used the expression which, reported to Mr. Gompers, led to his remarks. Now, these gentlemen want to correct that, and so they draw this in such a way that this act shall not cover any of those things—"No prosecution, suit," and so forth.

Mr. LITTLEFIELD. What does it do? Does it leave section 3, according to your judgment, in full operation?

Mr. DAVENPORT. Except so far as you have imported here a pasha, a magnificent three-tailed pasha, who is going to decide whether these things are in violation of that act; and upon the violation of any order that he makes after his decision there is a criminal penalty inflicted.

Mr. LITTLEFIELD. That suggestion applies to section 3 as well as to other sections. Is that your understanding of it?

Mr. DAVENPORT. It is carefully worded here and I will read you what it says:

*If any party or parties to any such contract or combination of which a copy or written statement shall have been filed as aforesaid shall do any act in performance of such contract or in pursuance of such combination after the Commissioner of Corporations or the Interstate Commerce Commission shall have entered an order as aforesaid.*

You must remember that he passes on all these questions. Recurring to the part underscored we have, first, that no prosecution shall be made unless it shall be of this character, unless it shall be in unreasonable restraint of trade or commerce or constitute a conspiracy, in violation of section 1 or section 3. You see they exempt conspiracies from it. Now, what I think merits a good deal of attention—not to repeat and rehash this thing over and over—is the character of this kind of a law, where Congress creates an officer and has him pass upon these questions, and when he has passed upon them and makes an order in regard to them, the matter is foreclosed so far as that party is concerned. He has to be subject, if he does a thing under that contract, to a fine and imprisonment. You know the scheme of the bill, as the Professor has been explaining it up to this very moment, that a man passes up his contract, and if the Commissioner thinks it is all right he does not disapprove of it. If he disapproves of it, that leaves him under the provisions of the old law. That was the theory upon which he was proceeding up to this time. Yet in this amended bill the reverse is true, so that when a man presents his contract there and the Commissioner says, "You can not do that," and enters an order to that effect, that poor fellow is shut out from that time on, and is made subject to a special criminal prosecution and his guilt, so far as the unreasonableness of the matter is concerned, is forever settled.

Mr. LITTLEFIELD. That is to say, your proposition is that the adverse judgment of the Commissioner, if it is finally sustained through this channel of appeal.

Mr. DAVENPORT. If he does not appeal.

Mr. LITTLEFIELD. If he does not appeal, or if it is finally sustained through the channel of appeal—

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD (continuing). Your proposition is that the determination of the Commissioner forecloses to this party the right to raise the question as to whether he is really guilty of an unreasonable restraint of trade?

Mr. DAVENPORT. Certainly.

Mr. LITTLEFIELD. It is practically a judgment that he is guilty under the Sherman antitrust act, and because it is an adjudication against him by the Commissioner, then it subjects him to a prosecution if he is guilty and he may be fined?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. It would be pretty rough if the Commissioner could make a valid decree under this that would foreclose a party in that way.

Mr. JENKS. That is not in this.

Mr. LITTLEFIELD. That is not your proposition?

Mr. DAVENPORT. No, sir.

Mr. LITTLEFIELD. Now, to get right down to this—you have called attention to this so far as the District of Columbia and the Territories are concerned. I want to know whether this bill has any reference to the amended provisions of that section, and if so, does it impair it or enlarge it, or does it not have any effect at all, in your conception? Then we will get right on that; let us get your idea about it.

Mr. DAVENPORT. I speak of this with hesitation, because it is difficult to grasp.

Mr. LITTLEFIELD. The Professor, I think, himself will grant that it is a little difficult.

Mr. JENKS. Yes.

Mr. DAVENPORT. This reads:

No prosecution, suit, or proceeding by the United States shall be begun under the first six sections of this act for or on account of any such contract or combination hereafter made of which a copy or written statement shall have been filed as aforesaid.

The first thing you have got to grasp in your mind is what are the first six sections of the act.

Mr. LITTLEFIELD. That includes section 3; that is obvious enough.

Mr. DAVENPORT. It includes one, two, three, four, and five. It does, because they are dovetailed right in here.

Mr. LITTLEFIELD. Do not confuse my mind with the others. Take section 3.

Mr. DAVENPORT. I think it will simplify matters if I take them up in this way.

Mr. LITTLEFIELD. Very well; go ahead.

Mr. DAVENPORT. It says any such acts as may be done as are defined in section 3 of this act.

Mr. JENKS. That should be, I have no doubt, in section 1 or 3, because it was not intended to apply only to Territories; it was intended to apply to States and Territories alike.

Mr. DAVENPORT. You think it should be added there?

Mr. JENKS. Yes.

Mr. DAVENPORT. That is a thing I did not think of.

Mr. JENKS. There was no intention to make any exception whatever. It was intended to cover both of those.

Mr. DAVENPORT. Does modesty forbid you to tell me who it was—

Mr. LITTLEFIELD. You use the words "as defined." Inasmuch as we have had considerable trouble on account of the uncertainty in regard to "reasonable" and "unreasonable," is not that language calculated to confuse a little bit?

Mr. JENKS. I do not know that it is.

Mr. LITTLEFIELD. What you mean is to predicate unreasonable restraint of trade upon the offenses denominated in those sections?•

Mr. JENKS. Yes; we are speaking of restraint of trade and commerce. It is really intended to be a definition of interstate commerce.

Mr. LITTLEFIELD. Certainly. Would it not be more apt if you put it something like this, "unless such contract or combination shall be in unreasonable restraint of trade or commerce as prohibited in sections 1 and 3?"

Mr. JENKS. That would be all right.

Mr. LITTLEFIELD. There is some little bit of confusion there. You did not intend to more specifically define "unreasonable?"

Mr. JENKS. No, sir.

Mr. LITTLEFIELD. It seems to me that is open to objection. What you mean is "in restraint of interstate trade and commerce?"

Mr. JENKS. Yes.

Mr. LITTLEFIELD. That, to a certain extent, clarifies the situation.

Mr. DAVENPORT. No; it only makes the confusion worse.

Mr. LITTLEFIELD. Put it in and see if it does, "in unreasonable restraint of interstate trade or commerce as defined in sections 1 and 3." That is the way you want it?

Mr. JENKS. That is the thought we had in mind.

Mr. DAVENPORT. There is no sense at all to that.

Mr. LITTLEFIELD. Very good; let us see why.

Mr. DAVENPORT. There is no definition in this, is there, of "restraint of trade or commerce" or "unreasonable?"

Mr. LITTLEFIELD. I do not agree with you.

Mr. DAVENPORT. I still maintain it.

Mr. LITTLEFIELD. That is all right; that is a privilege you have. But now hold on a minute. It is quite obvious to my mind, and I want to suggest this. This may suggest a consideration that has not occurred to your mind, alert as it is. It is quite obvious to my mind that when they say in this bill "in restraint of interstate trade and commerce as defined in sections 1 and 3 of this bill," the term relates to interstate trade and commerce as it is described in those two sections.

Mr. JENKS. It says in restraint of trade or commerce among the several States or with foreign nations, and so on; and in the other place, in order to be sure that they take in the Territories and foreign nations, it says, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, and so forth, all the way through.

Mr. LITTLEFIELD. Aside from that you simply say, as defined in those sections.

Mr. DAVENPORT. The word "defined" is an absolute misnomer.

Mr. LITTLEFIELD. We would be pleased to have your suggestion of another word.

Mr. DAVENPORT. I would suggest that you might insert the word "described" there.

Mr. LITTLEFIELD. Well, that may be happier. It is a minor criticism, in my judgment. I think I know what they mean.

Mr. DAVENPORT. I think the better way to state it is that you think you know what they think they mean. It does not go any more definitely to the proposition that I have in mind as to that loose and inapt language in which it is stated there; but this is a mere detail.

Mr. LITTLEFIELD. We will assume, for the purpose of the argument, that by the use of that language they mean restraint of interstate trade and commerce as described in sections 1 and 3.

Mr. JENKS. That will cover it.

Mr. LITTLEFIELD. Now give us the balance of your criticism.

Mr. DAVENPORT. Right in that connection I want to suggest that the use of the word "unreasonable" there, in connection with the other words, throws the machine clear off center again.

Mr. LITTLEFIELD. Your position is that there is some intendment in the act which undertakes to define, by reference to something else, the adjective "unreasonable?"

Mr. DAVENPORT. There is an attempt to make a provision here the different words of which are not adapted to the different parts of the thought attempted to be conveyed. However, that is a detail. We will come down now to this.

Mr. LITTLEFIELD. As you are right on the line of demarcation that separates one proposition from another, and it is now twenty minutes to 6 o'clock, I would suggest that we temporarily suspend and resume at a later hour with the expectation of concluding this evening.

(An informal discussion as to continuing the hearings followed.)

Mr. DAVENPORT. If it is understood that I may set forth all the objections I may have, briefly, to-morrow, that will satisfy me.

Mr. LITTLEFIELD. Do you want to be heard orally to-morrow?

Mr. DAVENPORT. Yes; I want to talk about this thing.

Mr. LITTLEFIELD. Go right along with Professor Jenks, then, and let us do the best we can and complete the matter so far as the affirmative propositions are concerned. Then I will have a meeting in my committee room at 2 o'clock to-morrow afternoon, and if Judge Davenport wants to be heard, all right, and if Mr. Schulteis, who has just asked for a hearing, wants to be heard at that time, I will hear him, and if you are at leisure, Professor Jenks, and can come in at that time, I will hear you further, if you wish to be heard.

Mr. JENKS. I will come if I can.

Mr. LITTLEFIELD. Is that all right?

Mr. JENKS. That is perfectly satisfactory.

Mr. SCHULTEIS. That is satisfactory to me.

Mr. LITTLEFIELD. Go ahead.

Mr. JENKS. There was only one point further that I was going to raise, and that was in connection with the decision of the Commissioner of Corporations, if it may be so called, in reference to the reasonableness or unreasonableness of contracts, and also in reference to any appeal from his decision, if he should decide that a registration needed to be canceled. The main difference that we have had in mind between this last form of the bill and the others was, in the first place, we thought it wise to change the order of the matter somewhat, and in the second place, there was this matter of appeal. It had seemed to be in the minds of some of the persons who had criticised the bill most unfortunate that as regards the question of canceling registrations a provision for an appeal was not made; so we have made that provision for an appeal to the supreme court of the District of Columbia.

It also had been thought by some most unfortunate that the appeal had not been made in a somewhat different way, too, so that the provision has been made now for a rehearing in the case of a contract that he may consider unreasonable, before the Interstate Commerce Commission, and then for an appeal from them to the supreme court of the District of Columbia. On that question of the appeal, when I was here before there were a good many questions asked as to whether this act of the Commissioner was legislative, executive, or judicial, and whether an appeal would lie, and so on. I said at the time, without anything further in mind than what seemed reasonable, and



what seemed the custom in other ways, that it had seemed to me that that act had enough of the judicial nature so that an appeal would lie, and that presumably Congress had the right to give to an officer who was primarily an executive officer enough power for judgment along that line so that an appeal would lie, and so on. I find one case that seems to me quite directly in line that would sustain that, and then there are quite a number of cases that certainly squint that way. In the first place, where he is exercising discretion, as he has to more or less with reference to cancellation of registration and with reference also to the nature of the contract, the act becomes somewhat judicial, I think. The one case that I had mostly in mind, that has seemed to bear closest upon this, is the case of the *United States v. Duell* (172 U. S., 576), where, in the case of an appeal from the Commissioner of Patents, the Supreme Court held that though the Commissioner of Patents "is an executive officer, generally speaking, matters in the disposal of which he exercises functions judicial in their nature may properly be brought within the cognizance of the courts."

And the court says further:

Now, in deciding whether a patent shall issue or not, the Commissioner acts on evidence, finds the facts, applies the law, and decides questions affecting not only public but private interests; and so as to reissue or extension or on interference between contesting claimants; and in all this he exercises judicial functions.

Let me read still further these words at the conclusion of the opinion:

We agree that it is of vital importance that the line of demarcation between the three great departments of government should be observed, and that each should be limited to the exercise of its appropriate powers; but in the matter of this appeal we find no such encroachment of one department on the domain of another as to justify us in holding the act in question unconstitutional.

It was an appeal from the action of the Commissioner of Patents to the supreme court of the District of Columbia, practically the same thing that was suggested.

MR. LITTLEFIELD. They held there that the determination was quasi judicial?

MR. JENKS. Yes, sir; those words are used here. The language which I read was:

Though he is an executive officer, generally speaking, matters in the disposal of which he exercises functions judicial in their nature may properly be brought within the cognizance of the courts.

I am quoting only here and there, but I think I am not misinterpreting it in any way. That has seemed to me the case most perfectly in line. It seemed to me further that, entirely aside from specific cases, the fact that the Interstate Commerce Commission has been recognized as in the main an executive body, but as exercising functions quasi judicial in their nature and subject to appeal, was also quite in line; and also some matters were cited this afternoon as to the work of the Civil Service Commission and otherwise. So that it had never seemed to us until the questions had been raised here in the discussion of the bill—although two or three lawyers were in consultation in the drafting of that bill—considering the nature of the functions, that there could be any real doubt that an appeal would lie under those circumstances. So, on the basis of what we had and what we found out, we had gone ahead on what seemed to us in the inter-

ests of the public and what would tend to satisfy the public, because I have myself a good deal of sympathy with the suggestion that is made that at first hand this seems quite a large amount of power to give to the Commissioner of Corporations. In my judgment the power given to him is very much less than has been intimated here in many cases; and with the rehearing before the Interstate Commerce Commission and the appeal that lies, it seemed to us that it was not a matter of danger to the country at all.

Let me quote in another connection a word or two that has a bearing. I had taken these notes in connection with the question of reasonableness. In the decision in the case of United States Interstate Commerce Commission *v.* The Railway Company (167 U. S.) I find this, again, to show that while an officer may be primarily executive or primarily judicial, nevertheless the various functions may be delegated. The power given to the Interstate Commerce Commission, as they here say, is partly judicial, partly executive and administrative, but not legislative. I quote this to show that a body that is mainly executive may be given judicial powers, and in this case an appeal will lie. As regards the general aspect of the case, that has been pretty largely presented by Mr. Smith. That is a part that I am not competent to discuss from the technical legal point of view, and I have nothing further to say along that line.

It has not seemed to us that this is an arbitrary rule. The Commissioner has certain determinations, as to the way in which a certain case shall be brought up and as to the nature of proof that shall be required, and I have some cases there, again, that would have a bearing on that. That is the second question, as to whether an executive officer may not, within certain limits, determine the nature of the proof that needs to be offered; that is, as to the shifting of the burden of proof. For example, there is a case—

Mr. LITTLEFIELD. That is, you mean whether the action of the officer could not produce that effect?

Mr. JENKS. Yes; and whether it is not entirely competent for the legislature to create a situation like that, where it may shift the burden of proof from one to the other. The case I have in mind is the case of the Chinese, where the burden of proof was shifted to the Chinese to prove their right to be here.

Mr. LITTLEFIELD. That is like the legislation that I have in my State, which makes a receipt for an internal-revenue tax prima facie evidence of the sale of liquor.

Mr. JENKS. It is similar.

Mr. LITTLEFIELD. It is along that same line.

Mr. JENKS. Yes. The point is this. The burden of proof rests upon the Chinese, practically, to show their right to be here; and I may say that there has been a late decision also by the Bureau of Immigration to the effect that a criminal has no right to come into this country, and the presumption against him is that he has no right to be here, and in a case of that kind it is presumed that the criminal has been here less than three years unless he himself will testify to when he did land.

Mr. LITTLEFIELD. Yes. You ought to bear in mind the fact also that that is hardly a question of criminal prosecution; it is a question of deportation.

Mr. JENKS. Yes; it is a question of deportation in both those cases; but they have gone ahead under those circumstances and put the

burden of proof upon the person who is charged, to show his right to be here, which is quite a change, of course, from the ordinary procedure. But the power of the legislature to shift the burden of proof in that way is unquestionable. I quote as follows from the case of *Fong Yu Ting v. United States* (149 U. S., 698):

A provision which puts the burden of proof upon him.

Then they cite a dozen cases here. The only point is that it is within the power of Congress so to arrange the method of bringing these suits that the burden of proof may be shifted in the way suggested. The Commissioner of Corporations, by making this determination, shall provide that the Attorney-General must prove the unreasonableness of the contract.

Mr. LITTLEFIELD. That is in it now?

Mr. JENKS. Not the unreasonableness. Under certain circumstances he has simply to prove restraint of trade. But you make provision now that upon a certain state of facts being found by the Commissioner of Corporations the burden of proof is shifted so that he has to prove an unreasonable restraint of trade as well as a restraint of trade.

Mr. LITTLEFIELD. The change does not shift the burden of proof any, except that it makes it incumbent upon the Government to prove a different state of facts from which it had to prove before.

Mr. JENKS. Yes.

Mr. DAVENPORT. Have you endeavored to run out the operation of this law? We will suppose that the Commissioner has held it unreasonable, and the appeal has been taken, and the appellate or supreme court, or whatever body it is, the Interstate Commerce Commission or the court, coincides in that view, or they come to the conclusion that it is reasonable. He is still, under your bill, exposed, is he not? Having litigated that question clear through those tribunals, he is still, under your bill, exposed to prosecution?

Mr. LITTLEFIELD. It is still open to the Government to establish, if it can, the fact that the agreement is in unreasonable restraint of trade.

Mr. DAVENPORT. Yes. Having litigated it all the way through for the purpose of having determined the question whether or not he is in their opinion guilty of something in unreasonable restraint of trade, and having taken it up and established his case, then he is still liable to be brought up by the new régime, whoever they may be, and prosecuted over again, and they can put him to all the expense of a trial, and so forth, notwithstanding these previous hearings. But that is a detail I want to talk about.

But, Professor, in thinking about this matter, has it ever occurred to you that there is a moral question involved in this?

Mr. JENKS. Very decidedly.

Mr. DAVENPORT. Here are acts that are made criminal by the law of the land and which subject a man to penitentiary stripes, and they are invited to do those very acts on the promise of immunity. Now, this is not the case of getting a present immunity for past offenses or upon condition of their repenting and coming forward and being willing to testify, or anything like that, but it is an act on the part of Congress inviting men to commit those acts which are by the very

statute made criminal, under a promise of immunity, in order that the Government may get some information. Does not that strike a professor in Cornell as a little shady, morally? And, further than that, I am reminded at this moment that the promised amendment which was to obviate the objections of Mr. Levy Mayer—that a person would be protected in some way from the consequences of his exposure of these matters, that he would be protected from State prosecution—does not appear to have eventuated so far in this bill. But I refer to this interesting problem in casuistry: How can men bring themselves to view as proper from a moral standpoint a proposition that men should be invited and encouraged to commit crimes, to wit, those in restraint of trade now forbidden under the law, under the promise of immunity from the consequences of such actions in the future, provided they will divulge something which the Government desires that they shall divulge?

Mr. JENKS. If I were disposed to go into questions of casuistry in detail, I should question the morality of that way of putting the question. The situation, as I look at it, is entirely different from that which Judge Davenport has in mind in making this statement. I have the same suggestions to make with reference to some statements made by Mr. Emery. Throughout the entire discussion there has been an implication on the part of both these gentlemen in their questions and in their statements that if a person wished to escape from the penalties of the present Sherman Act, when he was doing something that seemed to him in the interests of the public, although contrary to a law that he believed immoral in its essential nature, he was doing something immoral. The whole situation, perhaps, amounts to this: That in our judgment the present Sherman antitrust act has made criminal certain acts that in their essential nature are for the benefit of the public. So far as that is true, the Sherman Act itself in its operations is producing an immoral influence and is in itself morally wrong. When Judge Davenport asked the question that he has asked me, it should rather be put in this way—or I will take my own statement. I look upon it as not merely not an immoral act, but I look upon it not merely as a moral act, but as an act of duty that is imperative upon every honest man who has the interest of the public at heart, to attempt to take the public out from under an act, to a certain extent, that is as injurious to the public as that. I am perfectly willing to make any concession that can be made as regards the detail of the form of the bill, so long as we reach the essential principle of the bill. There has been no trickery whatever on the part of those, at any rate, who have been most active in framing this bill. The Judge implies that there may have been in this, that, and the other man's giving counsel. I have no reason for thinking so. I know that some men whose opinion has been asked on this bill have said, "Now, if I should consider the interest of my client in this matter, I should say this or that thing; but speaking to you gentlemen who are working for the interests of the public, such and such a thing seems to me proper;" and I have every reason, from what I know of those men, to think and to know that they were speaking with absolute sincerity, and I have no reason for thinking that anyone connected in any way whatever with this bill has had any interest except the public interest, throughout. That has been absolutely the case.

Our position in this matter is this: We have presented, up to date, the best we can find to carry out our ideas. What we present seems solely in the interest of the public, and seems solely taking away the effect of an act that is absolutely doing injustice and wrong, and that is contrary to the public interest. We have brought these matters up, and the responsibility is upon Congress, and primarily upon this committee, to see to it that the right purposes are carried out. We have no particular love for this, that, and the other form. As Mr. Low said the first day we were here, we came with a general proposition to relieve the people from the burdens of the act. The chairman of this committee, Judge Jenkins, and the chairman of the Interstate Commerce Commission, said: "If we are going to take any action, we must have something to go on. If you gentlemen will prepare a bill showing what you want, we will be glad to take it up." I want to repeat again what the chairman of the committee at one time said. The chairman of the committee in no way intimidated what he would want. It was simply to get something before him. So we presented a bill as best we could, and we have modified it as best we could, and we are willing to modify it again or have the committee modify it again. If we can in any way assist in the promoting the public interest along these lines, we are glad to do it. We think the present act is injuring the country and is, to that extent, having an immoral influence. We want to present a bill to take away that evil effect and do something for the public good. Now, when, with that in mind, you accuse us of attempting to encourage a criminal act, you ought to discriminate as to the nature of a criminal act. What is referred to in our bill is an act that has been made criminal by a law which, as we think, is immoral in its nature. It is not a prohibited thing on its face.

Mr. DAVENPORT. Do not, in arguing the matter, assume as though this was writing the word "unreasonable" into the first section of the act and making lawful all those acts that were in reasonable restraint of trade. The purpose of the act is to maintain the criminality of those acts as to everybody who commits them; but to give a man immunity and license and indulgence to go on and do them in the future, with the consciousness that he is to be protected from punishment, so long, at any rate, as the powers that be are willing that he should be protected, if he will give up something in the way of information that you think the public ought to have.

Mr. JENKS. Yes.

Mr. DAVENPORT. That is the proposition.

Mr. JENKS. Very well.

Mr. DAVENPORT. And I say it does not make any difference whether those acts are prohibited by the statute or are innocent in themselves, when the Congress of the United States, from its judgment as to what is public policy, makes an act criminal it is the duty of every good citizen to obey that act.

Mr. JENKS. And to enforce it. I have no objection to that.

Mr. LITTLEFIELD. As I understand the proposition of the Professor, it is that after all is said and done the truth of it is that the Sherman antitrust act ought not to apply to reasonable restraints of trade.

Mr. JENKS. Certainly.

Mr. LITTLEFIELD. And that while they do not go so far in this bill as to repeal that section of the law or that feature of the law, or to

amend it so that it will hereafter apply only to unreasonable restraints of trade, you leave the law in existence and use that fact for the purpose of producing this effect of publicity, and give to all who see fit to take advantage of it, on these conditions, the benefit of what the law would be if that was read into it. That covers it?

Mr. JENKS. Yes. I would like to cover it in a somewhat different way.

Mr. LITTLEFIELD. You take your own way, of course.

Mr. JENKS. It is not quite all here; that is, all that I had in mind. Speaking very frankly again, when this matter first came to me personally with reference to the form that this bill should take my first thought on the matter was of a bill similar to the Foraker bill in the Senate, simply putting the word "unreasonable" in and then stopping. Then the question came to me again in this way, so far as I know without any suggestion from anybody, that at the present time, in the present state of public opinion, so far as I could see I did not believe that it would be a practicable thing to repeal the Sherman Act absolutely, or simply to make that change with nothing further, and that in consequence the wiser way from the point of view of experience, if you please, or legislative wisdom—or whatever way you wish to put it—was to hold still in the hands of the legislature and the hands of the judiciary this power, and to make the exceptions; to let it stand, but to make exceptions instead of changing it all. I did not think it was a practicable matter to make it in the way it was suggested, so that we thought it better to let that stand and to make exceptions. Then there came a further thought, that after all it might not be possible to make this apply generally. There might be constitutional difficulties. And as I discussed it with other people there seemed to be constitutional difficulties about making that compulsory.

I have for years, not only here but in the State legislature and elsewhere, been of the opinion that it is often very desirable, instead of making compulsory legislation to make permissive legislation, so that through the permissive legislation we may find out more or less how the law is going to work; and if it works well with the people who are doing the right thing the pressure will then be brought to bear on the others. As long ago as 1900 I drew a bill for a corporation law for the State of New York with that in mind. I thought we ought to have a corporation law along the lines of the English corporation act, or as it is carried out still better in the Australian corporation act, and so I drafted it permissive, that any corporation that wanted so to do could come under the restraint of the act and be open to examination, the idea being that the better corporations would be glad to put themselves under restraint of a really good corporation law. The real thought was this: There are a good many corporations in New York that are carried on above board and that would be willing and glad to say, "This is our business, and this is the way we do business, and we are only too glad to have everybody know it, because then everybody will know that we are doing business in the right way and people will be glad to do business with us and invest in our stocks." And by the time any considerable number of those corporations have come under the operation of the law people will begin to say that those who do not come under the law stay out because they dare not come under it, and they will say that there must be

something shady about them, and they will say, "We will not buy their stocks." So in that way, indirectly, we thought we would bring about a gradual acceptance of this better type of corporation law.

That thought was in my mind and was discussed in that way. We were to leave this matter open. This is a permissive act. We hoped to bring it around so that it would be considered laudable to file this information that was called for and the larger part of their contracts and have the criticism made on them, and they would have no objections to their being made public; and then after a time, by this better class of corporations and larger corporations in many cases—because the smaller ones would not need to bother with it, but the larger class of corporations—putting themselves in this position, the others would feel the moral, and more than that, the financial pressure in favor of coming under this act. So by putting in that permissive feature that seems to Judge Davenport so immoral we were going to accomplish an end that seems to us highly moral and beneficial to the public; and the difference between saying "You shall do so and so" or "You may do so and so if you wish" is one that may be vital in constitutional law; and while it may be that some of the kinds of information they would be very glad to give might be of the kinds that we could not force out of them they still may be very useful to the public and the Congress to have. In connection with the giving of that information they can get these immunities which, after all, are not immunities to do anything that is wrong or for doing anything that is wrong.

Mr. DAVENPORT. Is it not doing wrong to violate a law?

Mr. JENKS. They will not be violating a law, because this law will provide that when they are doing these things their acts are not in violation of law.

Mr. DAVENPORT. Oh, no. You accomplish that result if you write the word "unreasonable" into the first section of the act; but you certainly can not maintain, or you can not say as you do here, that every contract, conspiracy, and combination in restraint of trade is illegal and criminal, and say that a man who does those things is a criminal——

Mr. LITTLEFIELD. I suppose, strictly speaking, you leave the provisions of the act in force, but provide that they shall not be in force except under certain conditions?

Mr. JENKS. Yes. I was going to answer the Judge in this way, that really all this objection he is making is a verbal quibble, because whether you say, "This act exists, but we provide you shall not enforce it under certain conditions," or whether we say that the act shall not apply under certain conditions, is really immaterial, and what this act really does say is that this act shall not take effect under certain conditions. Even though you say under certain conditions it shall not apply, it really means the same thing. If we are talking about casuistry, that is where it is, when you assume that we are legalizing a criminal act. We have made the act under these conditions not criminal; that is what it amounts to in its essential nature. That is all we are trying to do.

Mr. EMERY. If you will permit me right there, because I feel a very keen interest in this matter, it seems to me, speaking in connection with your use of the word "casuistry"——

Mr. JENKS. I simply quoted that. Judge Davenport introduced the word.

Mr. EMERY. If you predicate your legislation upon the innate necessities or weaknesses of business, then you make the same argument against the impossibility or impracticability or inexpediency or inconsistency of the law that Voltaire makes against the Decalogue when he maintains that the Almighty ought not to hold men responsible for the offenses that they commit out of the weakness that he gave to them. Now, if you take the ground that this is not a permission to commit these acts, it seems to me you lay yourself open to an argument exactly parallel to that against a certain practice of the Catholic Church, to wit, the issuance of an indulgence. It was held that an indulgence was a permission to commit sin, and it was defended on the ground that it was merely a means of assisting the church, and the law was thus dispensed, so that one man was permitted to disobey the Decalogue on a payment of an amount to the church. In your case you are merely issuing an indulgence to these persons or corporations on the ground of a payment of information which you assume is for the public benefit and which is necessary for the proper enforcement of the law. I can not see any difference between the act of which the church was accused in permitting the commission of certain acts upon the payment of money and the position you put yourself in, and which, without any intent to be misunderstood in using the term, without any compulsion you apply to form a legislative formulary by which a man is compelled to come in under that law and to turn over a certain amount of information, which you could have no direct right to exact, simply because he would put himself in an improper position before the public if he did not do so. You do not change the nature or the quality of the act under the first six sections; it is just as criminal as it ever was; but under this indulgence which you give, one man is to be permitted to do a thing which is denied to the other.

Mr. JENKS. The essential difference, and it goes to the root of it from the moral point of view, is that the thing that we permit him to do is in the interest of the public, the consumer, whereas what you are talking about in connection with the indulgence are things that in their essential nature are criminal and contrary to the public interest; and that is a vital difference. The only thing, you will recall, that we are permitting, even after he gives up this information and things of that kind, is a reasonable contract that is in the public interest.

Mr. EMERY. Yes; but you are assuming arbitrarily to say what that contract shall be, and you are constituting a private tribunal to judge it.

Mr. DAVENPORT. These things that are done for these men in violation of law to-day are in the public interest, he says.

Mr. EMERY. The violations are not.

Mr. DAVENPORT. The violations of the law?

Mr. LITTLEFIELD. You are assuming the law to be in existence. The condition at one time or another does not change the facts.

Mr. DAVENPORT. Congress is forbidding something that it is actually immoral to forbid, and every man that violates the law is doing it in the public interest and therefore he is absolved from any immorality if he violates the law. That is their contention.



Mr. JENKS. I have not said that.

Mr. DAVENPORT. Is not that true?

Mr. JENKS. I have not said that, of course.

Mr. DAVENPORT. Does it not follow?

Mr. JENKS. It does not seem to me so.

Mr. DAVENPORT. It would seem to me this way. It does not make any difference whatever in the moral aspect of the thing whether the Government says, "You can do the things forbidden by law," or the party himself does them.

Mr. JENKS. It makes a great difference.

Mr. DAVENPORT. The reason why this invitation to people to do these things is not immoral is because the things that are forbidden are immorally forbidden. That is the proposition, is it not?

Mr. JENKS. When you finish I will state my views of it.

Mr. DAVENPORT. I have thought about this a good deal.

Mr. JENKS. So have I.

Mr. DAVENPORT. It seems to me this is the most profoundly immoral proposition that was ever put up to an American Legislature; that men, being under the condemnation of the law for what they shall do in the future, receive from the lawmaking body itself an invitation to do the very things which are forbidden by the law, if they will do some other thing which the lawmaking body thinks is judicious for them to do. This does not relate to anything in the past. "When the wicked man turns away from his wickedness and doeth that which is lawful and right," as the Good Book says, "he saves his soul." Forgiveness in law, morals, and theology is confined to past transactions. He must turn back and take a new course. Now, to my mind there is a profoundly immoral idea involved in the proposition in this bill. The Congress of the United States is to say, "Here is an act so worthy of condemnation"—otherwise they have not any business to make it a crime—"that a man who does it shall be liable to imprisonment in the penitentiary, and every man who commits that act shall be subject to those penalties." Congress declares something to be against public policy. Any man who sets up in his private capacity to break that law commits an immoral act under every system of morals and theology. That being the case, every man who violates the Sherman Act commits an immoral act. And now the proposition of the Government is, "Come ahead and do those things; come on, now; you are to have license to do those things which we have seen fit to condemn, if you will pay us money, if you will reward us in one way or another, or if, what we think is in the public interest, you give up information." It seems to me, and I can not look at it in any other way than that it is what I say, immoral. Still, I do not set up myself to be a judge of morality.

Mr. JENKS. This is peculiarly interesting to me from the fact that this question, with somewhat different applications, is one that is discussed in every year in my class in the principles of politics; so I am quite familiar with this line of argument.

Mr. LITTLEFIELD. Do you land in the same place every time?

Mr. JENKS. I land in the same place every time. As I look at the matter, the situation is quite different from that which is set forth by the Judge. It all comes back to that question as to acts that are wrong of themselves and acts that are made criminal by statute. I myself take the position that it is the business of every citizen to obey

the law, even though the law may declare criminal certain things that he thinks the legislature has been unwise in putting into that category.

Mr. DAVENPORT. Which it would be for the public interest if it had not put there?

Mr. JENKS. I would be willing to go even that far. I say it is not the business of any individual to set himself up alone as a judge. It is the business of the individual to obey the law. I am entirely in accord with what the Judge says as to that.

Our proposition is an entirely different situation. What we propose is that these things which are not wrong in themselves, but are in the line of public policy in the judgment of people whom we shall give authority to to speak on that subject, a person may be permitted to do by this change in the law under conditions we shall lay down. Under those circumstances we do not say to him, "You, as a private citizen, may, in your judgment, violate the law." That would be to do an immoral act. What we do is this—when I say "we," I mean the lawmaking body. Congress is convinced that a preceding Congress made a mistake along certain lines, and that it will be in the interest of public policy to make certain exceptions to the act that has been passed before, and they prescribe the conditions of those exceptions, and under those circumstances there is nothing immoral about it, but in my judgment it is the duty of the legislature to bring about the beneficial results to the public that will come from it. Now, you may say very naturally under the circumstances, considering your opinion, that the act should be made general. I say that practically it is probably impossible to make it general. But even if we could make it general, we may accomplish even more, perhaps, in the public interest by prescribing the conditions under which the persons may get immunity. It is the same old thing that we have in all lines of municipal legislation. Personally I think that certain acts that are permitted under the law, for example certain types of liquor selling, if you like, are generally speaking contrary to public interest. Nevertheless it is thought that on the whole within certain limits a certain amount of liquor selling may be permitted, and the legislature prescribes the conditions under which a person may be permitted to sell liquor. For a person to sell liquor without his license would be immoral then, whether the selling of liquor is by itself moral or immoral; but it is perfectly right and proper for the legislature to say, "If you will pay your money in, we will give you a right to sell." In the same way we say, "If you give this information, you may have these immunities; otherwise you may not." And we believe on the whole that the public interest would be furthered more by a condition of this kind than it would be by throwing it open.

Mr. MARTIN. What I would like to inquire of the Professor is, what evidence has been submitted to this committee of any considerable body or any considerable number, or a large number of citizens who have combined in the United States, who are to-day rendered liable to the penalties of this act, and are complaining and desire to have it amended?

Mr. EMERY. I think Mr. Carnegie answered that. He said about one out of a hundred.

Mr. JENKS. The only answer I need give to that is that which has

been given repeatedly, that there is a public sentiment that way, and that so far as a large majority of the business men with whom I have come in contact for the last few years are concerned—

Mr. LITTLEFIELD. It is not claimed that there is any concrete evidence on that point that has been presented to the committee, or that they have suggested conditions under which they would like to make an arrangement and accomplish results.

Mr. DAVENPORT. I feel greatly indebted to the Professor for his explanation of this moral question which has been submitted by me. I now see why it is that these criminal things are permitted to exist. The President of the United States and the Attorney-General have to decide whether a party is to be prosecuted or not, and now if they consider that it is not in the public interest that the party shall be prosecuted, these persons are perfectly justified in going ahead and doing these things. That follows logically, I take it. The constituted authority says to men, "Go ahead; you are acting in the public interest; this law is a foolish and unwise law, and therefore you are permitted to do it." As I understand Professor Jenks, he will not concede the right of the individual to set up and judge for himself on the subject, but when the voice of the Executive gives him license to do these things, then he is entirely innocent; or do you make a distinction between the Executive, upon whom rests the question whether or not the law shall be in his discretion enforced and the lawmaking body which declares what the law is to be?

Mr. JENKS. I do not know how profitable this is, but I should say this in reference to the matter, that a certain amount of discretion exists in the Executive to determine when and where and how to prosecute; but that in the main, in my judgment, from the moral point of view—because I understand this is a moral discussion—he can have no view now.

Mr. DAVENPORT. Certainly; that is what bothers some of us.

Mr. JENKS. Yes. From a moral point of view I should say that it is the business of the Executive to enforce the law, and the Executive has been enforcing the law, but at the same time the Executive might perhaps have crowded a little harder in certain directions—that is possible, having exercised a discretion as to what they can put through or had better put through—but there are certain limits to the amount that can be done by the courts. We know how it takes a great deal of time to put a case through the courts, and there seem to be a great many violations of the law that they can not prove. However, since they have had a Bureau of Corporations helping them to make investigations they have done a great deal more along that line than before, so that I should say that it is not for me to criticise the acts of the Executive, but it is the business of the Executive to enforce the law as it is, and under those circumstances I should say that the private individual of the present time is not justified in doing these things contrary to the existing law; but now what we are proposing is this, that Congress itself shall make an exception, and then the individual, of course, is entirely justified in doing these things and it is his business to go in under the law.

Mr. MARTIN. I did not quite get the light I wanted on that point as to which I inquired.

Mr. MARTIN. If that is the case, then is it desirable—I should like evidence before the committee on that point. There is not any.

Mr. MARTIN. If that is the case, then is it desirable—I should like to ask the question of the Professor—for the law to be amended to exempt people who do not take interest enough in it, or are not sufficiently affected by it, to come here and argue for it?

Mr. LITTLEFIELD. The Professor thinks such a condition of general embarrassment exists as to justify him in making this effort. Is that it?

Mr. JENKS. Yes, sir. I would like to ask the gentleman if he thinks that any corporation officer who for any reason has subjected himself to prosecution under this law could be expected to come before this committee and say, "This law is oppressive, and it has so affected my business that I have committed a crime against the law?" We can not expect that. We have had men come here—in fact, it was suggested by a member of the committee to-day that he had friends in business who felt that they were violating the law continually. The same thing was said by the president of the Merchants' Association of New York, and we have had numerous people here say that there is that general feeling in the community; and under those circumstances I think it is not reasonable to expect a man to come here and say, "I have been violating the law," and that is the kind of testimony you are asking for. Is that a reasonable request to make?

Mr. MARTIN. The Professor has answered the question and stated that it is not a reasonable request to make, and I want to say that it is, in my judgment, a perfectly reasonable request, and it is a necessary inquiry for this committee to make, because if we are going to amend the law or practically destroy a law which has been welcomed by the great majority of the people of the United States as a very beneficial law for years and years, if we are now going to be requested to modify that law in a very serious way, we ought to have some substantial reason for doing it, a stronger reason than the mere statement that there are a large number of people, without any evidence how many they are and who they are, or without the submission of a single case where they have been punished unjustly, who are complaining of this law.

Mr. LITTLEFIELD. That has been gone over half a dozen times, and the chairman has gone into it fully, and he expressed definite opinions upon it.

Mr. MARTIN. One other point. I notice that there were inquiries made as to the authorship of certain sections of the bill, as well as of the Sherman antitrust act, and, as Judge Davenport has suggested, one of the gentlemen, Mr. Stetson, who was the representative of the steel trust, drew the amendment referring to the labor part of it. If there are proposed amendments that may perhaps exempt the steel trust, and if the attorney of the steel trust is the author of those amendments, I think it is important to the public that that should be known. It is important to the consideration of this act. I submit it is not an unreasonable request that the chairman or Judge Davenport made for information as to who were the authors of the various provisions of this act. I think we are entitled to know that. I think that Congress is entitled to know it—Congress and the public are entitled to know it. Certainly these gentlemen have an interest, those of them who are publicly believed to be, and I am sure are, acting in violation of the act to-day. Now, you have had submitted evi-

dence that these things are being done in violation of the act, and for an act to be amended on behalf of or at the request of men who are violating it, and the amendment to be written by the men who are to-day in violation of the law, it seems to me is a procedure that ought to be gone over very carefully before it is accepted, either by the committee or by Congress. I think we ought to have further light upon that subject. Judge Davenport has made the same request, and I think the chairman has made it, and I think we ought to have information upon that point, and if we had that information, then if it is a fact that gentlemen who are to-day, and have been for years, combining and conspiring in criminal violation of the law are now coming here with a proposition to amend the law to let themselves escape we ought to know that fact and bring those men here and find out what the reasons are for making such an unusual request as that.

MR. JENKS. If you will look at my testimony that was given before, you will find that I stated that I questioned whether there was any section of the act that any person could take the credit, or the discredit, as the case might be, of drafting. I think there is not a suggestion I made that has not been greatly modified. I think there is not a single section of that act that has not been greatly modified. You have just cited that section in regard to the labor unions. While Mr. Stetson drafted the first form of that act, it is not true that it stands as Mr. Stetson drew it. That change in regard to the incorporation of the common law was certainly not put in by Mr. Stetson, and I do not know whether he approves it or not.

MR. EMERY. Who did that?

MR. JENKS. That is something I am not at liberty to say.

MR. EMERY. I wanted to call your attention to that, because the President said yesterday in his message that he did not wish to authorize or legalize such boycotts or blacklists as were unlawful at common law. It might be interesting to know whether there was ever a blacklist or a boycott that was lawful at common law.

MR. JENKS. I purposely have not brought up this question of the exemption of labor unions. Let me repeat what Mr. Low said to begin with, and what I am sure the Federation will stand for, so far as that provision in regard to labor unions was concerned. It has not been the intention of the committee to legalize what are called "secondary boycotts" in the report of the Anthracite Coal Strike Commission, to which you yourself kindly called my attention; and if this act does that, it should be changed so that it will not do that.

MR. EMERY. Have you any doubt about that—of the language as it stood there?

MR. JENKS. I do not think that it did.

MR. EMER. Do you still think so?

MR. JENKS. I do not know that I need express any opinion. My further opinion was that the act as it stood then and as it stands now does not legalize the boycott in the sense in which they put it. On the other hand, as I said before, labor unions themselves, under the law as it stood, thought they were forbidden to strike in many cases. In fact, they questioned whether their very organization as such was a legal organization. I was thinking of saying to-day, when Mr. Emery was speaking, that I rather thought, from the attitude he took and what I know of the attitude of the committee, that Mr. Emery and I

could sit down together and frame that section in a way that would probably satisfy us both, because, so far as I could see, there was no difference of opinion. We do not want to legalize the secondary boycott. We do not want to legalize anything that will lead to criminal acts against the public of any kind. At the same time, Mr. Emery showed so much consideration for the labor unions and their friends, to benefit their conditions, and perhaps neither believing that they needed to strike at times nor to carry out that, that I think it is entirely probable we can be entirely as one on that question.

Mr. DAVENPORT. Do you think the courts make any distinction between primary and secondary boycotts?

Mr. JENKS. That I shall have to say I do not know. As I say, I have not gone into that question.

Mr. DAVENPORT. The vice, the legal fault, in every form of boycott, primary, secondary, and all others, is this: That it is a combination of many to oppress one. I gave an illustration of it this morning, where a man goes to a baker and they all combine; it is that power to oppress, to coerce, to oppress and injure. Now, is it your idea that under the language as you had it drawn originally a primary boycott is to be legalized?

Mr. JENKS. I have stated, I think, all that I need to state on that question.

I wanted to add a word further, since the Judge has raised that, that I found in a good many of his statements I would be inclined to differ with him in his use of the word "motive" and in his use of the word "purpose;" and that is a distinction that Mr. Wilson, I think, attempted to make this morning, and I think that should regularly be kept in mind, as to whether when an act of a labor union injures a person, whether the primary purpose is to do the injury or whether the purpose is something entirely different, and the injury is incidental. I am not going to try to go into that in a specific way. It would take too long.

Mr. DAVENPORT. That distinction has been attempted to be made time and time again, and the courts have uniformly turned it down—that men can not combine for a noble motive to oppress another.

Mr. JENKS. I think you would naturally find that held by the courts—"to oppress another." You have added something further there.

Mr. DAVENPORT. That is the purpose. The purpose is to bring pressure to bear upon a man to make him do something that he does not want to do. Now, the purpose may be to get him to join the church, or it may be to get him to do something else. The motive, the courts say, has nothing to do with it; it is the purpose to oppress people; and they do not make any distinctions in law between the primary and the secondary boycott; they say there is a power in numbers.

Mr. EMERY. The distinction made by Judge Gray was not only a distinction in morals, but in law. He made the distinction which has been pointed out, that a thing might be incorrect and immoral, but it, under certain circumstances, might not be unlawful.

Mr. JENKS. I think we might conclude this part of it by simply saying that if it does not carry out the purpose we had in mind we would be very glad to have it altered so that it did.

I wish to express to the chairman the appreciation of this committee for his great courtesy and patience in giving us all this time he has given us, and also to those who have opposed the bill. We have learned a lot, and I think the hearings have been in the interest of good legislation. Whether this bill is passed through, or some other bill, I hope this may be in the interest of starting things, at any rate.

(At 7.15 o'clock p. m. the subcommittee adjourned until to-morrow, Friday, May 1, 1908, at 2 o'clock p. m.)

**STATEMENT OF EVERETT P. WHEELER, ESQ., OF 21 STATE STREET, NEW YORK CITY.**

Mr. WHEELER. Mr. Chairman, I did not expect to appear before this committee this morning. I was here on another matter, but I am here, and am very glad to have the opportunity. My objection to the present bill that is under consideration is that it interferes unduly with the existing rights of action. I have sent to the chairman some proposed amendment to that clause of the bill which deals with those existing rights of action.

Mr. LITTLEFIELD. That is the damage section?

Mr. WHEELER. The damage section.

Mr. LITTLEFIELD. If you prefer, I will put right into the record, as a part of your remarks, the amendment you suggested.

Mr. WHEELER. I should be very glad if you would. I think that amendment would relieve the situation and would express more correctly the idea that I understand to be in the mind of Professor Jenks, which is that those existing rights of action already sought to be vindicated by suit should not be interfered with.

One word in regard to this business of treble damages. I have been for nearly two years engaged in the preparation of a suit against the United Fruit Company, which has the control of 90 per cent of the banana trade of the United States. My client was one of the competing companies that was driven out of business by that combination. In the course of that two years' preparation I have been obliged to examine carefully how damages could be proved in such a case as that, and I came to the conclusion that to comply with the rules of law, even as I understood them, was a very difficult task, and that the provision of the statute giving treble damages really, in ordinary cases, would give no more than the recovery for the actual damages.

Mr. LITTLEFIELD. That is, if I understand you right, you ran across the distinction between speculative and conjectural damages, which was the indeterminate element involved?

Mr. WHEELER. Exactly.

Mr. LITTLEFIELD. Of course we are confined to what is definite, which eliminates conjectural and speculative.

Mr. WHEELER. Exactly. The Supreme Court held with great justice in the Atlanta Pipe case (203 U. S., 390) that the provision of the statute on that subject was not a penal provision. I submit for the reason I just mentioned, that the damage sustained would ordinarily be much more than the party could prove by evidence. Take the particular case I am speaking of, the controversy between

the American Banana Company and the United Fruit Company. We have actually been driven out of business, our plantation in Panama has been seized, and we were never able to export a single cargo of bananas. True, the matter has been appealed, but Judge Hough, in the lower court, held that inasmuch as we never had begun the export of bananas we could not recover anything, and dismissed the suit because of the fact that no business in the way of export had actually been begun. Suppose we had begun a little, suppose we had exported a single cargo, how difficult would it be to prove how many cargoes thereafter we would have exported, and yet the damage is just as actual. I therefore submit that the treble damage clause ought not to be repealed unless something is put in place of it that will do justice between the parties, and this was my suggestion upon that point, that the statute should provide, instead of treble damages, that a jury might award exemplary damages. The chairman suggested this morning that there were many cases in which common-law exemplary damages could be recovered. That is true often, but at the same time that rule has not been applied to cases of this sort as yet.

Mr. LITTLEFIELD. That is, you might be devoid of that remedy in the Federal court?

Mr. WHEELER. Precisely. I think probably you would be, under the existing decisions, and therefore, as you are trying—for I know that is the purpose of the committee—to give a reasonable remedy, I suggest that it would be more just to allow a jury to give such exemplary damages as under the circumstances, subject to the revisory power of the court, they should think were just. I think I can speak from forty years of experience in the trial of cases that the courts exercise their revisory power over verdicts which sometimes are excessive, with great judgment and fairness, and there is no reason for defendants to feel that too severe verdicts against them would be tolerated. On the other hand, I think, under existing conditions, the damages often are entirely inadequate. You take that case that came up from San Francisco. It was a combination among the tile dealers there.

Mr. DAVENPORT. Montague and Lowry?

Mr. WHEELER. Yes; thank you; Montague and Lowry (193 U. S., 39). There the damages recovered were only \$500, and yet it is very evident from reading the record that the actual damages must have been very much more, and the award of treble damages was no injustice to the defendant and did not more than compensate the plaintiff.

Mr. LITTLEFIELD. Probably inadequate, even under those circumstances?

Mr. WHEELER. Precisely. So much for that, for I do not want to take the time of the committee. Now, for the other point that has been made, in which my client is not at all interested, but I am, as a citizen of the United States, interested in what Mr. Malby said this morning. I do feel that the language of the Sherman Act is a great deal too general; that it prohibits combinations that ought to be allowed. I must say I was not surprised at the opinion Senator Hoar is reported to have expressed at the decision in the Trans-Missouri



Traffic Association case (166 U. S. 291). A great many members of the bar felt that there was a contract that was really made to enable those railroads to comply with the requirements of the interstate-commerce law, and that it would have been better if the court had seen its way clear to uphold the validity of that agreement, and they say: "The language of the act is general; it prohibits all combinations; we can not look into the merits of them, and therefore we must enforce the language of the law as it stands." I do think it is possible to draw an amendment to the Sherman Act which shall prohibit the abuses of combinations.

May I make an illustration from actual fact in this very case I have been working on for so long and with a great deal of care? What were the methods that were resorted to there? First, an attempt to control the growing of bananas by making agreements with planters that they would sell only to the combination. Second, the establishment of a company in this country called the Fruit Dispatch Company, which should make agreements with retailers that they would buy of nobody but the combination. Third, provision by which those that did buy from the independents were boycotted. Fourth, arrangements with the railroads by which exclusive facilities were given to the combination. For instance, at Mounds in Illinois and at Kansas City large sheds were erected by the railroads, inclosed, warmed in winter. Banana cars were necessarily run in there in winter to keep the bananas from freezing, and those sheds were leased exclusively to the combination. Those things were in unreasonable restraint of trade, and no fair dealer ought to ask to have the power to do those things. I think this provision of the Sherman Act could be modified so that it would prohibit those abuses and at the same time permit the fair combinations, which Mr. Malby referred to, and which ought to be put in.

Mr. LITTLEFIELD. We have had this point made to us, that if we undertake to import into the Sherman Act the term "reasonable" or "unreasonable" we import into it such an element of uncertainty as would destroy its validity as a penal statute. Quite a number of authorities have been called to our attention which seemed to look that way. You appreciate the suggestion?

Mr. WHEELER. Yes, sir.

Mr. LITTLEFIELD. Of course if we put into the act language that destroys its validity, we would not be accomplishing anything. It is an extremely difficult subject to deal with.

Mr. WHEELER. Of course, I am a lawyer and have been trained all my life to the use of legal phrases and they seem familiar to me. The phrase "in unreasonable restraint of trade" is sufficiently explicit, I should say, that a court could enforce it. It leaves a good deal to the judgment of a court, and we do that both in England and in this country. We leave a good deal to the judgment of the jury, and can we make a wise statute that will not leave a great deal to their judgment? The Sherman Act tried to leave nothing to their judgment, and made this sweeping prohibition. Everybody now, the President, the judges, and I should say the great majority of those who have studied the subject, agree that it is too sweeping. How can you limit it? You might possibly undertake in the statute to say what should and what should not be an unreasonable restraint of trade. That would be a difficult task, but it perhaps could be done.

I would like very much to see the chairman of the committee attempt it.

Mr. DAVENPORT. Do you think that this would do, that all that the Commissioner of Corporations declared to be reasonable should be reasonable, and all that he held not to be reasonable should be unreasonable? Do you think that would do?

Mr. JENKS. That is not the present bill.

Mr. DAVENPORT. I understand. I would put this bill in the wastebasket. But it occurred to me that if it was so desirable to accomplish the results that Mr. Malby suggests, would this do, that the subject of all of these agreements, combinations, and conspiracies shall be submitted to the judgment of the Commissioner of Corporations, and those that he declares to be reasonable shall be reasonable and those that he declares to be unreasonable shall be unreasonable. Would such a law as that, you think, stand?

Mr. WHEELER. I do not think just that law would stand, but I think it is quite possible that, subject to the limitations Mr. Malby suggested, it might be subject to the review of the courts. That is to say, you can make the decision *prima facie*—in short, take this very Trans-Missouri Traffic Association, suppose there had been such a law, and they had made their contract, and they had gone to the Commissioner and said to him, "Here is our contract; do you approve?" and he had said, "Yes; I approve," it would have been lawful. The Federal Government ought not to be permitted to challenge by collateral suit such a decision by one of their own officers, but if it came up in a collateral matter, between private individuals, the court might review the decision.

Mr. DAVENPORT. Suppose an act was passed that in all matters of contract, forbidden in the Sherman antitrust act, a certain executive officer of the Government shall have the power to determine that they are not unreasonable restraints of trade, and at the same time to determine that certain other ones are unreasonable, do you think such a power as that could be conferred upon an officer of the Government so that those contracts which he held to be in reasonable restraint of trade, must be, by the courts, held to be in reasonable restraint of trade?

Mr. WHEELER. I do not think you could make his decision final in a civil suit, but I do not see why you could not make it final so far as criminal prosecutions were concerned, to provide that no man should be subject to indictment for doing the thing that that commissioner had licensed, and is that not really the solution of the difficulty? You can not, under our law as I see it, and as I understand Mr. Malby states his view of it, in which I entirely concur, you could not make the decision of an officer of the Government in a matter of this sort absolutely final, but I submit with great confidence that you can make it final to this extent, that a thing which the officer of the Government had licensed should not be subject to indictment.

Mr. LITTLEFIELD. Does it not depend a good deal on the kind of power that is vested in the officer of the Government?

Mr. WHEELER. Surely.

Mr. LITTLEFIELD. If it is an executive power, I suppose we agree on the proposition that his exercise of the discretion is conclusive. If it is not conclusive, then the judiciary has the control of the execu-

tive. This involves quite a good many questions. I suppose this power must be one of three kinds. It must be either legislative—that is, a power that is vested in the Commissioner of Corporations to produce these results we have been discussing—I suppose it must be either executive, legislative, or judicial. Those are the only three we know anything about. If it is executive, I suppose that the executive discretion is final. I do not know what view you take of it, but I suppose as a matter of law we recognize the fact that neither the legislative nor the judicial branch can control the executive in the exercise of its discretion. That is fundamental. Do you agree on that?

Mr. WHEELER. Yes; in general I should.

Mr. LITTLEFIELD. I mean in general.

Mr. WHEELER. Of course it is a very sweeping proposition.

Mr. LITTLEFIELD. The fundamental proposition of our Government is that it is divided into three coordinate branches, executive, legislative, and judicial, and most of us understand that there is a fine line of demarcation between those three, and within each each is supreme.

Mr. MALBY. I do not suppose Mr. Wheeler wants to consent that the king can do no wrong.

Mr. WHEELER. Certainly not.

Mr. LITTLEFIELD. That may be true; but that is not involved at all in the exercise of the executive discretion.

Mr. WHEELER. I want to make this distinction that possibly might not have been in the mind of the chairman, and is exceedingly important. I understand it to be well settled that while it is true that legislative power can not be delegated, yet it is also competent for Congress to provide a certain system of rules and devolve the administration not only of those rules but the determination of what cases should come within them, upon the Executive, of which the civil-service legislation is one of the best illustrations. Here Congress, twenty-five years ago, passed a law providing for the classification of certain officers of the Government upon certain principles laid down in the act, and authorized the Executive to go on and extend that classification. That act has been very little amended, and yet it is a fact that whereas when it was first adopted only about 13,000 officers of the Government were included within its scope, I saw by the last return of the Census Bureau that 179,000 are now included. Partly that is the growth of the service, but almost half of it comes from the extension of that rule by Executive order. The validity of that sort of legislation has been sustained by the Supreme Court. So I would say in this case that Congress should pass a law providing, determining the principles upon which the Commissioner of Corporations should act, as, for example, that he should allow a contract which was in reasonable restraint of trade, and refuse to allow a contract that was in unreasonable restraint of trade; I should say that Congress might delegate to him that power. It is quasi legislation, it is true, because Congress could legislate; on the other hand, it is quasi executive, because it is the application by an official of a general rule to particular classes of cases.

Mr. LITTLEFIELD. What would you say was a reasonable restraint of trade?

Mr. WHEELER. I should say an agreement between railroads by which the rates of fare should be regulated between terminal points.

Mr. LITTLEFIELD. On the part of business corporations?

Mr. WHEELER. Providing the rates were not excessive; that is another proposition.

Mr. LITTLEFIELD. Does that not involve the whole thing? Is the rate the touchstone in the case of the railroad; and is the price of the commodity the touchstone in the case of the corporation?

Mr. WHEELER. Not the absolute touchstone, but so far as railroads are concerned, it is and always has been a touchstone.

Mr. MALBY. You do not confine that to railroads?

Mr. WHEELER. No.

Mr. MALBY. That same law exists with reference to anything. If I ask a gentleman to carry me down to my hotel and he charges me \$10, he can not collect it; he must charge only a reasonable price.

Mr. WHEELER. That is true.

Mr. LITTLEFIELD. That may be true, but if he charges you \$10 and you pay it under protest, can you collect it back; but if you pay it to a railroad, can you not collect it back?

Mr. MALBY. I do not know about those propositions.

Mr. LITTLEFIELD. Is there any law on earth that enables the consumer to recover an excessive price from the seller of ordinary merchandise?

Mr. MALBY. I did not mean to get into that, but the proposition, to this extent, that no person can make an unreasonable charge for anything.

Mr. LITTLEFIELD. That brings it down to the specific question, if it comes down to the question of price, whether that is the touchstone.

Mr. WHEELER. I do not think it is.

Mr. LITTLEFIELD. It is a constant factor?

Mr. WHEELER. It is an important factor, but I do not think it is at all the touchstone.

Mr. LITTLEFIELD. What is the touchstone of a reasonable agreement in restraint of trade, if it is not price?

Mr. MALBY. Reasonable price; yes.

Mr. LITTLEFIELD. Reasonable price and unreasonable price are correlative terms. If reasonable price is not the touchstone, what is the touchstone, or isn't there any?

Mr. WHEELER. As I say, the touchstone is what was suggested by Mr. Justice Holmes in his dissenting opinion in the Northern Securities case. He says the object of the Sherman Act was to prevent the ferocious extreme of competition, and it was not enacted to prevent an arrangement between competitors by which they should cease to compete with each other.

Mr. LITTLEFIELD. What is the object of the ferocious extreme?

Mr. WHEELER. To drive people out of business.

Mr. LITTLEFIELD. And what was the object of that, to increase the price to the men who were left in?

Mr. WHEELER. Precisely.

Mr. LITTLEFIELD. Does that not come down to price after all?

Mr. WHEELER. Price is a factor.

Mr. LITTLEFIELD. If it is not the principal touchstone, if it is not the touchstone, what, in your judgment, is the touchstone of a reasonable agreement in restraint of trade? That is, what is the test?

It may be that there is no test, but I just want to call your attention to this further fact as bearing upon this, that the courts have held that the question of determining whether an unreasonable rate had been charged by a transportation company and been paid is a judicial question, that is, when the consignee brings his action to recover the excess, because the courts have always held that when paid under protest, at least he could recover the excess, when it was an unreasonable charge; but the court also held in the same case that the power to determine what the charge should be was a legislative question; that is, the power to determine whether an unreasonable rate had been charged was a judicial power, but the power to determine what rate should be charged was a legislative power. Now, then, that is as to railroads. If the same legal propositions applied to merchandise, you would have a judicial power to determine whether an unreasonable price had been charged, and a legislative power to fix the price to be charged. If the parallel is complete—I do not see it is as yet—I am unfamiliar with the law that puts merchandise on a par with railroad rate legislation.

MR. MALBY. Mr. Wheeler did not quite complete his statement with reference to the power of Congress to delegate its authority to a commission. He made some reference to what I said about the matter. My proposition was that Congress did have power, perhaps, to delegate power to a commission to inquire, and at least tentatively to determine, what should be done and what should not be done, but always with the inherent right on the part of the person or persons to be affected of appeal to the courts. You can not take away a person's right to appeal to the court by legislative enactment, where it affects his life or property. The courts are always open to him.

MR. WHEELER. The courts in New York and other States have been reviewing the action of these bodies under the civil-service legislation, whether it is valid or not.

MR. LITTLEFIELD. What have they done? Have they gone any further than this? I suppose that has come up mainly under the question of removals?

MR. WHEELER. Partly, and partly change of classification.

MR. LITTLEFIELD. That involves the same thing.

MR. WHEELER. Partly the same.

MR. LITTLEFIELD. Have they gone any further—I am not so familiar with the cases, and I am glad you are—than to determine whether or not the executive officer whose act was called in question had complied with the law; or have they gone further and found that he not only complied with the law, but that they did not approve of the exercise of his discretion within the law?

MR. MALBY. That is exactly what they did decide, that latter proposition, that the discretion was not wisely exercised.

MR. WHEELER. That they abused the discretion.

MR. LITTLEFIELD. And therefore the act was not valid?

MR. WHEELER. Yes.

MR. LITTLEFIELD. There is a case where they reviewed executive discretion. What is the case?

MR. WHEELER. I will send you a memorandum of it.

MR. DAVENPORT. Mr. Wheeler, there is a proposition that I would like to ask your opinion about. Would it be a valid exercise of the power of Congress to vest in a commissioner a power to say that a

certain contract was reasonable in one man and precisely the same contract was unreasonable in another man?

Mr. WHEELER. No; I am clear that that would not be lawful.

Mr. JENKS. May I interrupt to say, because the implication is that that is in this bill, that there is nothing like that in the bill?

Mr. DAVENPORT. No. This is the point. The proposition is, as I understand it, to confer upon the commissioner the power to say to this man, "Your agreement is in reasonable restraint of trade," and at the same time say to the other man that his agreement is in unreasonable restraint of trade, and the first man is exempted, then, from prosecution by the Government, and the other man is subjected to it. Is that not intrinsically violative of the fundamental principles of our Government?

Mr. WHEELER. I think it is. May I add one word there? I did not mean to get into that part of the discussion.

Mr. LITTLEFIELD. That is the genesis of this bill; is it not?

Mr. JENKS. That is not in the bill.

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SUBCOMMITTEE NO. 3, COMMITTEE ON THE JUDICIARY,  
HOUSE OF REPRESENTATIVES,  
*Thursday, April 30, 1908.*

The subcommittee met at 10 o'clock a. m., Hon. Charles E. Littlefield (chairman) in the chair.

Mr. DAVENPORT. While we are talking about the matter of damages, Mr. Wheeler, have you noticed provisions that have been introduced from time to time by the chairman of the committee in bills introduced by him fixing a certain minimum as to the amount of damages which a party could recover—\$250, I believe, was the amount in the bill as it passed the House?

The CHAIRMAN. You mean the bill as it was some time ago?

Mr. DAVENPORT. Yes, sir. Do you think that a provision limiting it in that way would be constitutional—that the jury should award damages at not less than \$500?

Mr. WHEELER. That would be in the nature of a penalty, I think, which would be constitutional. I doubt the wisdom of it as applied to so general a law as the Sherman law.

The CHAIRMAN. That particular provision would not proceed on the compensatory idea, but on the idea of a penalty.

Mr. WHEELER. That would be a penalty, pure and simple.

Mr. JENKS. When you replied that in your judgment it would not be possible for the power to be granted the Commission to declare that one contract was reasonable and the contract with another man would be unreasonable, you started to make some further comment and were interrupted. I wish you would continue on the other point that you apparently had in mind.

The CHAIRMAN. That is, you may add anything that may occur to you.

Mr. JENKS. Yes; there was apparently some other point that you were going to make when you were interrupted.

Mr. WHEELER. I was going to say this: I have no hostility to trade unions. I am counsel for one of the most important trade unions in the country, the Union of Masters, Engineers, and Pilots, which has its branches on the Lakes, as well as on the seaboard, and which is rather proud of never having had a strike. It is managed, I will say, with very great judgment and ability, and I sympathize thoroughly with the objects of the unions so far as they are directed to promoting and keeping up a reasonable standard of wages and getting reasonable conditions for their labor. They ought to have them all, but when they go further than that and seek to wage warfare upon other citizens, they go too far. In my judgment no officer can lawfully be authorized by statute to give to one set or combination of individuals—whether trades union or capitalists—any rights or privileges that were denied to another. They ought all to come under the equal protection of the law.

The CHAIRMAN. Right here, Brother Wheeler, let me interrupt you. This amendment to section 3 does give to the employers and employees the right to combine possibly to get satisfactory terms for their labor, and leaves all the provisions of the Sherman antitrust law in full operation as against all other possible combinations for any other purpose. This is the amendment that I have here, not the bill.

Mr. JENKS. It is the same. I was handing Mr. Wheeler the Warner bill, but it is the same thing.

The CHAIRMAN. Section 3 expressly provides for possible agreements between employers and employees to get satisfactory terms for labor, and it still continues to apply to all other possible agreements for all purposes and, therefore, clearly raises a distinction. Do you think that is competent as between the people upon whom the bill operates? It is section 3, and is as follows:

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

No provision of the Sherman antitrust law shall be—that is to say, that section expressly exempts all combinations from the Sherman antitrust law, but it clearly leaves the Sherman antitrust law in possible agreement with any other purpose, for all other purposes. Do you think that gives to all people the equal protection of the law?

Mr. WHEELER. No; it does not seem so to me.

The CHAIRMAN. Do you not think it would be unconstitutional?

Mr. WHEELER. It seems to me that it would be, although I have not considered that subject as carefully as I would like.

The CHAIRMAN. I understand that is a prima facie judgment.

Mr. WHEELER. That is my impression. I am well aware that to express accurately a proposition of this sort is very difficult, but what I would aim at, certainly in drafting such legislation, would be to

take it out of the category of class legislation, making it general in its object and expression, and to try and deal with actual abuses.

The CHAIRMAN. As I understand it, you would not approve of any legislation that made any discrimination against the class of people upon whom the law operates?

Mr. WHEELER. No; it seems to me that that would be un-American.

The CHAIRMAN. It would certainly be in violation of the proposition of the equal protection of the law.

Mr. WHEELER. It would seem so to me. I do not see how that can be avoided.

The CHAIRMAN. In connection with your suggestion in relation to the civil service—and as to which I am very glad you made the suggestion you did—is it not a fact in connection with the Federal civil service that the rules and features involved in its operation are specifically laid down by statute?

Mr. WHEELER. The general rules are, and that is the distinction I tried to make, that a statute—

The CHAIRMAN. Suppose they did not have any general rule laid down?

Mr. WHEELER. They prescribe general rules, and the application of them, in all the great variety of details, can constitutionally be left to the officials.

The CHAIRMAN. Does the case that you have in mind go so far, for instance, as to hold—of course, we have the civil-service law in operation in connection with the vast majority of Government employees, and we have continual classifications or promotions and demotions; that is, removals from the service—but do the authorities you have in mind go so far as to hold that whenever any head of a bureau or head of a Department here in Washington, proceeding under the rules laid down by the statute, after having heard the employee in question, may exercise his exclusive discretion in making that discharge, assuming that he has complied with the executive features of the law; is that reviewable by the court?

Mr. WHEELER. No, sir.

The CHAIRMAN. It does not go so far as that?

Mr. WHEELER. No, sir.

The CHAIRMAN. So that is a case where the Executive action is not reviewable by the court?

Mr. WHEELER. No, sir.

The CHAIRMAN. Does not the same principle apply to classification; is that not the great feature of the civil-service law in which the employee is interested?

Mr. WHEELER. Do you mean whether or not he should be included in the classification?

The CHAIRMAN. No. Whether or not he is entitled to his place and is not subject to removal except for specific cause.

Mr. WHEELER. Well, of course he is interested in that.

The CHAIRMAN. Well, that is his principal interest in the civil service.

Mr. WHEELER. After he once gets in.

The CHAIRMAN. I do not suppose we have any legislation that would compel the induction of the man into office. You may compel



the officer who examines to examine, but you can not compel him to reach a result.

Mr. WHEELER. What our court of appeals found was this: That it was unconstitutional to say that the person who came out at the head of the eligible list should be appointed; that some discretion must be left to the Executive power, and that it was, however, lawful to do as the Federal statute and our own New York statute both did, to limit him in his choice to a certain number at the head of the list; as, for example, three or five, or whatever it may be.

The CHAIRMAN. That did not proceed upon the hypothesis that they were narrowing the exercise of the Executive discretion, but that, on the contrary, they were recognizing its infallibility.

Mr. WHEELER. The court recognized it?

The CHAIRMAN. Yes, but limited the exercise of the Executive discretion, but when it was exercised it was supreme.

Mr. WHEELER. Precisely; I quoted it for that purpose.

The CHAIRMAN. I got the impression that it led the other way; I got the impression that it went so far as to review the exercise of the Executive discretion when it was abused, but on the other hand, this case simply holds that the Executive had no right to exercise the discretion, but when exercised, it could not be reviewed. That necessarily follows, I suppose?

Mr. WHEELER. Well, the line is not so sharply cut. I think there are cases where they have undertaken to say that the discretion was abused which was not fairly exercised, and the court could not say it was a legitimate exercise of discretion.

The CHAIRMAN. The McNulty case, in connection with the decision in the Post-Office Department, goes further in that direction than any case to which my attention has been called. I think they did hold that the court would not interfere with the discretion of the Post-Office Department unless it appeared to be a very clear case of abuse, but it was dictum in that case, because in that case I do not think they undertook to review or control, and that is the strongest expression that my attention has been called to on that line. Would you think, brother Wheeler—of course, I understand all these are prima facie matters and it would seem hardly fair to examine a man in detail on this subject without his having had an opportunity to examine the law, although I know you have had—do you think there is a legal or constitutional parallel between the right to control the price of commodities or merchandise and the right to regulate the price of transportation?

Mr. WHEELER. No, I do not.

The CHAIRMAN. That is, it is conceivable to your mind that Congress may have the power, or the courts may have the power, first, for instance, to determine whether a rate charged and paid, is not unreasonable, and, therefore, there may be a recovery for the excess over and above the reasonable amount, and where the legislature may have the power to say what the rate shall be for transportation, but that that same power may not apply to the price for which merchandise is sold?

Mr. WHEELER. I should distinctly think that there is a very wide distinction, and if I may add one word, it was stated by Mr. Malby that no one could exact an excessive price. Well, that is true. If

I make a sale of a piece of goods to another man and ask an excessive price for it he is not bound to pay me unless he has agreed to, but if he has agreed to pay I can make him pay unless fraud or misrepresentation should have intervened.

The CHAIRMAN. In other words, the same legal rule does not apply to a transaction of that sort as does apply to service rendered by a public carrier.

Mr. WHEELER. Precisely; where it was understood to be a public use.

The CHAIRMAN. Men having a public franchise.

Mr. WHEELER. Yes. The question came up before the supreme court of New York in about 1834, I think it was, as to whether or not the legislature could delegate its power of public domain so that a railroad company could condemn land for its uses, and it held, and so did the Supreme Court, if I remember correctly—but it certainly was held for I remember that Chauncey Woolworth delivered the opinion, that the uses of the railroad or other common carrier were public uses and the legislature could provide a system by which its power of eminent domain could be invoked to compel the sale of land to such a carrier.

The CHAIRMAN. I think you are correct about that. Have you covered all the ground that you desire?

Mr. WHEELER. I have indeed; much more than I expected.

Mr. F. E. STEBBINS. Mr. Chairman, may I ask a few questions of Mr. Wheeler?

The CHAIRMAN. If it is agreeable to him, certainly.

Mr. WHEELER. I could not refuse to answer any questions.

Mr. STEBBINS. Were you before the Department of Justice when the facts with regard to this matter were referred to with reference to the control of the Habana trade by the American Fruit Company—when it was submitted to the Department of Justice and they were asked for a decision under section 4 of the act?

Mr. WHEELER. Well, this is what we have done, Mr. Chairman—if it is desired, I will answer with pleasure; I have not the slightest objection to answering.

The CHAIRMAN. It is not especially a material matter, but Mr. Stebbins does not ask it out of mere curiosity, I know, and you may answer it if it will not be embarrassing to you professionally; if so, do not hesitate to say so.

Mr. WHEELER. Certainly not; it will take five minutes to answer it, and I do not want to take up so much time and carry the committee too far afield. But this is what we did: The tort that was committed was committed in the Republic of Panama. We first brought the matter to the attention of the Department of State. Mr. Reed remonstrated with the local authorities and said: "Your redress is in the court." We thereupon brought this action that has been mentioned in the circuit court of the United States, and Judge Huff decided that the courts could afford us no remedy. Thereupon a resolution was introduced in the Senate requiring the Commissioner of Commerce to make an investigation, and that resolution I had the honor of being heard upon last week, and I am very much in hopes that the committee will recommend its adoption to-morrow. That

is the position of the matter. We have not been to the Department of Justice.

The CHAIRMAN. On what grounds did Judge Huff hold that you were not entitled to your remedy?

Mr. WHEELER. He held that inasmuch as the officials of the Republic of Costa Rica had committed these acts and their acts had been ratified by the Republic, that there was no judicial redress.

The CHAIRMAN. That it was an international proposition?

Mr. WHEELER. Precisely. We thought and still think that he was wrong, and we are trying to assert that on a writ of error to the circuit court of appeals, but that is what he did hold.

The CHAIRMAN. If it was a part of that same combination, and the conditions were brought about that you have described in relation to transportation and in relation to terminal facilities all as a part of the combination, it seems almost obvious that these things, being done in this country, and the authorities doing those things, although they may have projected part of the controversy into a foreign country, they could hardly escape responsibility for that reason.

Mr. WHEELER. I do candidly think so; I think that Judge Huff was wrong; if I am capable as a lawyer of forming an opinion in a case in which I have been consulted—that is, an independent opinion—I would say that that is my independent opinion.

The CHAIRMAN. I expect that under the facts as you have stated them you will come out all right in the end.

Mr. WHEELER. I am very much gratified to have the Chairman express that opinion.

Mr. STEBBINS. I am glad to know that Mr. Wheeler persisted before the Department of Justice in that case, and I would like to state a matter with which I am familiar, that is, with regard to the Addison Pipe and Steel case.

The CHAIRMAN. Mr. Stebbins, you wanted to ask some other questions, I believe?

Mr. STEBBINS. I wanted to state a fact in regard to the Addison Pipe and Steel Company case. I was in the city of Washington in 1896 and stopped at a place, and Mr. Bible, the district attorney of Tennessee, came up to Washington with the avowed purpose of getting permission from Attorney-General Harmon to institute suit in equity against this combination. He went to the Department of Justice and came away very much displeased. I happened to meet him in the evening and he used anything but biblical language; he was swearing and cursing and damning everybody, including the Attorney-General and the Department of Justice, and he swore that he would not leave the city until he had authority to institute that suit. He went to the Department of Justice every day for a week at least—I saw him every day—and finally, after raising a row there generally, the Attorney-General gave him permission to institute the suit. I do not know whether Brother Wheeler insisted that a suit be brought or not.

The CHAIRMAN. I do not quite see how that is connected with Brother Wheeler's difficulty. Now, Mr. Jenks, we will hear you.

## STATEMENT OF J. W. JENKS.

The CHAIRMAN. Mr. Jenks, let me ask you before you begin, if this typewritten copy I have here is a duplicate of the Warner bill, or some other bill?

Mr. JENKS. No; it is the duplicate of a revision that has been suggested. That is the final form in which we have anything of this kind. It is identical with the Warner bill, so far as that one section is concerned, but there are quite a number of other changes.

The CHAIRMAN. I did not know but what you have it in print; if not I was going to have it printed.

Mr. JENKS. No, sir; it is not printed. I may say that the essential difference between this bill and the former printed bill is, in the first place, a matter of rearrangement merely. The most important thing is in connection with the question of appeal. In case the decision of the Commissioner of Corporations as regards the reasonableness or unreasonableness of the contract, is not satisfactory, there may be a rehearing before the Interstate Commerce Commission with the Commissioner of Corporations. Then we provide for an appeal to the supreme court of the District of Columbia.

But I wish to speak to-day primarily on points that are not primarily legal, but economic. When I was here before I had supposed that I was going to speak as an economist primarily and not as a lawyer, but I found the questioning primarily along legal lines. I answered those questions as best I could, on what seemed to me to be just and right, and said that afterwards the legal end would be presented, which has been presented with a considerable degree of fullness by Mr. Smith, the Commissioner of Corporations. I wish to take up one or two of those legal points, and will do so before I get through. Primarily, however, I wish to speak along other lines, because I believe that is more important and will be more beneficial, coming from me.

Mr. EMERY. I just want to ask you, for the purpose of future argument, if the amendments which are suggested in your last draft are also suggested as amendments to the pending bill or of the same character?

Mr. JENKS. Yes, sir. This may just as well be submitted and put into the record now.

The CHAIRMAN. I will have that printed, Mr. Jenks. At this stage of the record, I will put this suggested amendment right in as a preface to your remarks, so that it will be printed in the record. It is now in evidence.

Mr. JENKS. In the first place, I want to say a word with reference to the change in the law. The presumption always is, I think, in favor of existing law, and the burden of proof rests upon those who wish a change in the law. I think that has always been the case, but, on the other hand, it seems to me that it is the duty of the lawmaking body to recognize that in the very nature of the case there are changes occurring continually with respect to economic conditions in the country and that no law can stand still when economic conditions are changing and changing as rapidly as they have been for the last fifteen or twenty years. It is to be expected that laws must be modified more or less in order to meet those new conditions.

Now, I would put down as a first proposition that the principle of free competition has been practically proved by economic conditions to be a principle that can not be accepted absolutely as regards our lawmaking. The principle of free competition at the time of the passage of the Sherman antitrust act was rapidly bringing about a condition of monopoly in the industry of this country. I think there can be no question that it was the principle of free competition that was bringing monopoly. We had the organization of the Standard Oil trust, to begin with, in the trust form. We had the organization of the whisky trust, the organization of the Sugar Refining Company, known as the sugar trust. All of those trusts were organized practically under a régime, from a legal point of view, of free competition. Those trusts were held, as we know, particularly in the cases in New York, to be unconstitutional and to be invalid.

The CHAIRMAN. I suppose we have the common-law proposition in the various States, but your whole discussion is intended to be confined to the commerce law primarily?

Mr. JENKS. Yes, sir; primarily; but even going outside of that, in most of our States we did not have at that time any law specifically forbidding contracts that tended toward monopoly. It was simply the general provision of the common law.

The CHAIRMAN. That is right.

Mr. JENKS. Then in 1890—largely. I had supposed and I think it was generally supposed, because the people had found that there were growing up these great combinations that were in the first place in restraint of trade, but in addition to that were bringing about monopolies in our different States along all of those lines—in response to a popular fear that had come up (and a fear that was very natural under the circumstances) the various antitrust acts were passed in the different States, and the Sherman antitrust act was passed by Congress. It seems to me, under the circumstances, considering the rapidity with which these great combinations had arisen and with which these great monopolies had arisen, it might be expected that very many of those laws would go too far, and the Sherman antitrust act goes too far, in spite of the very thorough and careful consideration that was given it by able men. It was very natural that, with the trend of public opinion back of it, as strong as it was, and the feeling on their part that they must stop monopolies, they should have gone too far, and I think they did.

Now, what has been the effect and what was the effect in the United States of forbidding absolutely the attempt at monopoly and forbidding combinations to operate in restraint of trade? Whether they were reasonable or unreasonable, it was an attempt practically to block the working of economic operations by absolutely forbidding combinations, and the reason for that is this: If there is anything that is practically fundamental in business relations, it is this, that you want to save waste in every case that you can; you want to save energy in every case you possible can. Now, there can be no doubt at all that so far as many of these combinations were concerned, at any rate so far as these great organizations were concerned that were growing up within the States themselves, their formation was an attempt to make a saving.

Now, after what Mr. Malby and others have said, I do not think I need argue the question that there have been evasions of the Sherman

law; there can be no doubt that there have been a great many attempts at evasion of the law, and in a great many cases there was a direct evasion of the law, or direct violations of the law, that were not found out. Lawyer after lawyer will say to you that in many cases it has been his endeavor to keep his client out of jail—that is to say, that he would try in some way or other to get them within the technical letter of the law so as to protect them—when at the same time he knew there was a violation of the spirit of the law. If one takes up specific instances, of course he will see at once that no lawyer will tell if there have been violations of the law. If I know of a case where there is a violation of a public law, am I going to tell it in a public hearing like this and encourage a case against my client?

I do not need to dwell on that. Of course there have been many instances where there have been evasions of the law. The second point is this, that this attempt to prevent absolutely any combinations has resulted in a changing of the form of the organizations that were being made without any essential change in the real nature of their work, or in the fact that there was a combination to effect these savings and to secure a monopoly in many cases. For example, we had to begin with, the trusts, as I have said. Before, we had not even the form of trusts. We had pools. Suppose we take, for example, the so-called "whisky trust." In order to effect various savings on the one hand, and primarily, in that particular case, in order to prevent what they themselves felt to be an unreasonable competition, what at any rate was a very serious competition, resulting in the failure of many of them, they had established pools from time to time. In those pools they would agree to limit their output to 40 per cent of the normal capacity, say, or they would fix a price and agree to sell at that price, but ordinarily this pool was on the other line; they would limit their output, say, to 40 per cent or 50 per cent of their normal capacity. In a little while after they had started on that, some person would violate the agreement and begin producing more than he agreed to produce, or, if the agreement happened to be on price, he would begin cutting prices, and as soon as they began to find that out the others would immediately follow suit and the whole combination would fall. They tried pooling, which was in many cases contrary to law, but they did it whether it was or not. Then they tried the trust organization, which they at first thought was lawful, and then the law was passed forbidding all kinds of trust combinations. Now, what was the result. The result of this extreme antitrust, antimonopoly legislation has been to drive the organizations into more complete monopolies, and into more rigid forms of organization than they had ever had before. A trust is a mild kind of an organization as compared with one great single corporation that dominates the whole situation.

Mr. WASHBURN. You happen to speak of the whisky trust?

Mr. JENKS. Yes, sir.

Mr. WASHBURN. And of the fact that they in the early days controlled pretty much all the product of the market.

Mr. JENKS. Yes, they did.

Mr. WASHBURN. I happened to be looking at a case in the fifty-second Federal Reporter, at page 104, which was brought under the Sherman antitrust act. It is held here that although the whisky

people controlled 75 per cent of the distillery products in the United States, fixed the price at which the purchaser would sell such alcohol, and compelled the purchaser to sell the alcohol at no less a price than that fixed by them, it held that it could not be assumed from those allegations that the means used were in restraint of trade under the Sherman Act. My only point is that a large number of those combinations existed prior to 1897, which were proceeded against under the Sherman antitrust act and held to be perfectly lawful combinations, and that it was the decision of the Supreme Court in 1897, in the trans-Missouri case—practically making new law on the subject—that turned them into illegal combinations.

Mr. JENKS. Yes, sir.

Mr. WASHBURN. And that, I assume, is perfectly well understood, but from what you said the decision was not made perfectly clear: you seemed to be in some doubt as to whether those combinations were lawful, but they were lawful and were so held by the courts for a long time prior to 1897, and subsequently to the passage of the Sherman antitrust act.

Mr. JENKS. The point that I especially had in mind was this, that wherever we have legislation that is sweeping in its nature and goes so far that it is really contrary to the normal business methods of the country at any time, it is going to result in one of these two things: In the first place, in the violation of the law to a very great extent, and in the second place in an attempt to adopt a new form of organization. Often the law will produce a new legal form of organization without really changing the essential nature of business. That was the point I had in mind.

Mr. EMERY. If you will pardon the question, do you wish to be understood by the examples that you have quoted, where the combinations that you have particularly referred to are formed, that from an economic standpoint, as well as from a legal one, they ought to be permitted to exist?

Mr. JENKS. No, sir; not at all. It is simply this, that if you attempt to block ordinary business, carried on in the ordinary way, which people ordinarily believe to be moral, right, and fair, you are not going to succeed in accomplishing your purpose; you are simply going to allow men to shift their ways of doing things but the same end will be reached finally.

Mr. EMERY. Do you wish to intimate that the kind of organizations that you have just described belong to the category of those that are ordinarily considered moral and right?

Mr. JENKS. Not necessarily; the only point I wish to make in connection with that is that under modern conditions, with the ease with which goods can be shipped from one place to another and the rapidity of the transmission of intelligence by telegraph and mail, all that sort of thing, we are bound to have combinations in one form or another, and if we attempt to block it, or forbid it absolutely, we are sure to fail. So the only point about the matter is this, or the problem that that leaves before us, is to see how we can most wisely, in the interest of the public, regulate those combinations and not attempt to forbid them.

Mr. EMERY. You began, in the discussion that you are now indulging in, with the statement that the principal effect of the Sherman

Act, whether it was the intent or not, was to prohibit combinations and not to regulate them.

Mr. JENKS. In very many cases that is true. I beg to call attention along this line to the manner in which things are carried on in other countries in order that we may see how this principle works out. It has been said repeatedly that the United States is the home of the trusts, and, in my judgment, primarily, that is true, because here we have attempted more than has been the case in any other civilized country, as far as I am aware, to block ordinary agreements, many of which are not contrary to public policy, though some of them of course, many of them in fact, may be contrary to public policy; but in attempting to block them all, as we have done, we have simply forced our business men to come together into a great single corporation, where one man may exercise ten times the power that he could possibly exercise if he were only one member of a smaller corporation that had made an agreement with another corporation along lines that were according to public policy.

The CHAIRMAN. Do you take the ground that a combination or conspiracy that tends to monopolize trade can be reasonable?

Mr. JENKS. I would like to answer that in this way: In this last form of the bill which will go into print the section of the Sherman antitrust act that forbids monopoly stands, so that we are not advocating—

The CHAIRMAN. That is, you do not have the bill apply to that section?

Mr. JENKS. Not section 2; you will find that in this form of the bill. Now, I make that statement because I do not wish to be misunderstood. I would myself say independently and as a personal judgment that there may be such a thing as a reasonable monopoly that will be in the interest of the public, and I cited an instance of that the other day, which would not concern necessarily the interstate commerce, although it might.

Mr. EMERY. Public or private?

Mr. JENKS. It might be either; there might be public monopolies. The post-office—of course we all recognize the advantages of that, but there may be a private monopoly also, and it might also restrict interstate commerce—perhaps in the case, let us say, of a telephone company that covered more than one State. Now, in my judgment the telephone business is such, being a natural monopoly, if you please, that it is in the public interest to have that business a monopoly.

The CHAIRMAN. That is a public use—a telephone.

Mr. JENKS. Yes, sir; that is a public use. In my own personal judgment there may be a proper monopoly, but I am not bringing that in in this connection at all.

The CHAIRMAN. In the investigations that you have made have you ever found occasion to predicate upon a combination or conspiracy that attempts to monopolize trade, the element of its reasonableness or unreasonableness?

Mr. JENKS. Not if you put in the word "conspiracy," or, I think, if you put in the word "monopoly" either.

The CHAIRMAN. That tended to monopoly; I do not mean monopoly, but that tended to it.

Mr. JENKS. I think that would be true. I was going to add that in this eighteenth volume of the Report of the Industrial Commission



there is a fairly thorough study of the way in which combinations have been made and of the laws regarding combinations in foreign countries, Europe, for instance, and the essential difference between those laws and the Sherman antitrust act, as I understand it, is practically this, that they do recognize that there may be combinations made and agreements made among individuals and among corporations, etc., that are in the public interest, or that are not contrary to the public interest—put it either affirmatively or negatively, as you please—and so recognizing them, they have permitted those agreements. The result, I would say, is to a considerable extent this, that they have their so-called syndicates and their so-called cartels or agreements in Germany. They have their great corporations in England, or their associations of corporations both in England and in France, that are not in their essential nature so monopolistic as our single great corporations are.

The CHAIRMAN. What language do they use in their legislation for the purpose of accomplishing that result?

Mr. JENKS. I am glad to have the opportunity of supplementing what was said by Mr. Emery with reference to the legislation of England which had tended along this line. The legislation of England has followed this course: In addition to repealing certain of the old-time restrictive legislation which was beyond any question out of date and which was hampering business, the English Government some five or six years ago, after preliminary investigations of four or five years by very careful experts, introduced and passed a new corporation act. Their corporation act had before that been perhaps better than ours in many ways, but in the new corporation law of England they have succeeded in getting practically all of the publicity that we are asking under this bill, and they have also taken what pains they could, and have succeeded fairly well through publicity in preventing overcapitalization.

The CHAIRMAN. Do they prevent that by publicity alone or by a specific provision of the statute?

Mr. JENKS. That is primarily by publicity alone in that country. On the other hand, in Germany they get much more directly at the matter. In Germany they provide, in the first place, for a large degree of publicity—more than anything we have here—and in addition to that a corporation that files its articles of incorporation and names in them the amount of its capital stock has those statements reviewed also by Government officials, so that they there determine whether the capitalization is an overcapitalization or not. There they want a direct act, but in England it is different. In England it is confined to publicity along that line. Now, so far as England goes—

Mr. EMERY. But in both cases that you have mentioned there is no separation of the powers to begin with, and in the second place the regulative power of Parliament, or the legislative body, is extreme and extends to all forms of commerce and not merely to one phase of commerce, does it not?

Mr. JENKS. I was going to say that in England and Germany there is no distinction made between interstate commerce and state commerce, such as there is here. It is nevertheless the essential idea that if you are going to prevent the abuses of monopoly, you must let the people know what is going on. That would hold in either case, and

that is pertinent to our discussion here. So, also, I think, is the further point that you should not attempt to forbid all kinds of combinations pertinent, inasmuch as there they recognize that very many of them are in the public interest.

Now, so far as Germany is concerned, they have their court decisions that hold that certain combinations that have been made were not reasonable and were contrary to the public interest and contrary to the public policy.

On the other hand, both in the Reichstag (their Congress) and in their courts they have recognized very fully that many of these combinations might be reasonable and in the public interest. The court in one of its decisions went very much further in the way of recognizing the advantage that will come from combination. I think I should read a few sentences here to show how far they go on that line, although I want expressly to disclaim here that I would go that far. I will print more fully:

#### APPENDIX V.

##### LEADING DECISION REGARDING THE VALIDITY OF A COMBINATION CONTRACT.\*

41. Associations of tradespeople for the bringing about and maintaining adequate prices for the products of their industries. Are the restrictions to which the members submit on account of the rules and regulations of the association concerning their industries consistent with the principle of freedom of industry; and can the fines for the nonperformance of the contract be claimed through the court? Have the members the right to go out of the association at any time against the rules of the latter?

(VI Civil senate, decision of February 4, 1897, I. S. B. (defendant), v. The Combination of the Saxon Pulp Manufacturers, plaintiff (Compl.), Rep. VI, 307-396. 1. General court of justice (Dresden). 2. Court of appeal.)

In March, 1893, a great number of firms which produce in Saxony white pulp formed the "Saxony Combination of Pulp Manufacturers" with the object "of preventing in future the ruinous competition among themselves and obtaining an adequate price for their product." In order to realize this aim the members pledged, under penalty of a fine, to sell their product exclusively through a joint selling agency. The combination was formed to continue until October 31, 1895.

The combination, maintaining that the defendant became a member of the combination, but contrary to the rules repeatedly sold his product in the years 1894-95 directly to the paper manufacturers without the mediation of the joint selling agency, demanded the payment of the fine which the defendant incurred by the nonperformance of the contract.

The court of first instance denied the claim because it held that the combination had not legal standing to bring the claim; the court of appeals, on the contrary, convicted the defendant on the charge made. Upon revision of the case the verdict of the court of appeals was reversed, and the case was referred to the court of the second instance for another trial and decision; the arguments of the defendant, however, that he could at any time, at his will, leave the combination because the whole contract on which the combination was constructed had no legal force, and the fines which were included in this contract could not be claimed, were declared to be without foundation.

For the reasons: The senate, in revising the case, denied the claim in the first place on the basis that the contract of March 22, 1893, to which the defendant later agreed, as the lower court has established, is lacking legal force because it conflicts with the principle of the freedom of industry. This argument, however, can not be considered to be proved. The combination now presenting the claim is formed, as is clearly expressed in the rules, and also not disputed by the parties concerned, with the object of preventing in future a ruinous competition among the Saxon pulp manufacturers, and making possible the attainment of higher prices than can be obtained in the state of unlimited

\* Entscheidungen des Reichsgerichts in Civilsachen, Band 38, S. 155.

competition. As to the question whether a combination pursuing such aims violates the principle of industry laid at the foundation of industrial regulation, there came into consideration two points of view: One, whether through combinations of tradespeople which endeavor to obtain certain minimum prices is counteracted, in an inadmissible way, the intention of the lawgiver in so far as the latter wishes to promote the interests of the community through freedom of industry; further, whether through contracts of this nature individual freedom is narrowed in some manner conflicting with the aim of the legislator.

The first of these two questions was repeatedly answered in the affirmative, especially outside of Germany. (Comp. Pohle, *Die Kartelle in the Preussischen Jahrbüchern*, vol. 85, pp. 407, etc.; further, in the treatises published in the *Schriften des Vereins für Sozialpolitik*, vol. 60, part 2; *Des syndicats entre industriels*, etc., en France, by Claudio Jannet, pp. 20, etc.; *Kartelle in Russland*, by Jollos, pp. 43, etc.; *Industrielle Unternehmerverbände in den Vereinigten Staaten*, by Levy von Halle, pp. 112, etc.) On the other hand, however, the following has to be taken into account. When in a branch of industry the prices of a product fall too low, and the successful conducting of the industry is endangered or made impossible, the crisis setting in as the result of such a state of affairs is detrimental, not only to individuals, but also to society as a whole; and it is, therefore, in the interests of the community that improperly low prices should not exist in a certain branch of industry for a long time. The legislative bodies have often, and up to recent times, attempted to obtain higher prices for certain products by the introduction of protective tariffs. Therefore it can not be simply and generally considered as contrary to the interests of the community when entrepreneurs interested in a certain branch of industry unite with the object of preventing or moderating the mutual underselling, and, as a result of the latter, the fall of prices of their products. On the contrary, when prices are for a long time actually so low that financial ruin threatens the entrepreneurs, their combination appears to be not merely a legitimate means of self-preservation, but also a measure serving the interests of the community. The formation of syndicates and cartels of the kind here discussed is, also, on many sides determined as a means particularly suited to render great service for the adequate progress of the whole economic life of society in so far as it prevents uneconomical working at a loss, overproduction, and the catastrophes connected with it. (Comp. Kleinwächter, *Die Kartelle*, pp. 160, etc.; Brentano, *Über die Ursachen der heutigen sozialen Noth*, especially pp. 23, etc.; Steinman Bucher in *Schmoller's Jahrbuch für Gesetzgebung*, vol. 15, pp. 451, etc.; Mauck, *Ein Weltmonopol in Petroleum*, pp. 7, etc.; Seeman, *Die Monopolisierung des Petroleumhandels*, pp. 3, etc., and others.)

In conformity with this it has already been declared more than once, by German and other courts, that it does not antagonize the principle of freedom of industry (in so far as the latter has to guard the interests of the community against the self-interest of individuals) when people carrying on the same business unite for the purpose, pursued in good faith, of keeping alive a certain branch of industry by protecting themselves against the depreciation of their products and other damages resulting from mutual underselling.

(Compare decisions of the first civil senate of the supreme court of June 25, 1890, in the decision of the supreme court in civil senate, vol. 28, p. 238, etc.; of the Bavarian supreme court of April 7, 1888, in *Seuffert's Archiv*, vol. 44, No. 13; of Dresden court of appeal of September 19, 1893, in *Saxon Archiv*, vol. 4, p. 303, etc. Compare also the Italian decision communicated by Kohler in his work *Aus den Patent und Industrierechte*, I. Teil, pp. 85, 86.) Agreements of the kind here mentioned consequently can be objectionable only when they interfere with the interests of society, which are protected by freedom of industry—only when in certain cases doubts appear on the ground of particular circumstances, namely, when their clear aim is to bring about an actual monopoly and usurious exploitation of the consumers, or when such consequences actually come about through the combinations and arrangements which take place.

As to the second of the two questions above mentioned, the regulation of the industrial law (according to which everybody is guaranteed the individual right to carry on any business to his liking, in so far as the law prescribes or allows exceptions and limitations) is not to be interpreted that no one can subject himself by a contract to whatever limitation as to where and how to carry on a business. That this is not the meaning of section 1, industrial law, was recognized by the imperial court in repeated decisions, by affirmative answers to the question whether the so-called suppression of competition is consistent with

law, adding that through such contracts the industrial freedom of the individual is to be restricted, but not taken away forever, wholly or in part.

(Comp. Seuffert, *Archiv*, vol. 35, No. 196, decisions of the R. G., imperial court, in *Civil Senate*, vol. 31, pp. 98, etc.; compare, besides, the decision of the former Prussian supreme court of justice in the collection of decisions of the same, vol. Imperial supreme commercial court, vol. 12, pp. 29, etc., Seuffert, *Archiv*, vol. 80, p. 1, etc., Seuffert, *Archiv*, vol. 34, No. 105; decision of the R. O. H. G., 32, No. 310.)

The restrictions to which the defendant submitted in the given case by agreeing to the contract of March 22, 1893, neither as regards their extent nor the time for which they were agreed to are so far-reaching that they could be considered as violating the principle just mentioned—the divesting of the defendant in any unallowable manner of his industrial freedom.

Besides the question discussed hitherto, whether the contract on which the suit is based is consistent with law, it is still to be investigated whether legal protection should be denied to this contract, although it is not to be considered invalid. Under the condition of the present case it may be left undecided whether suit can be brought to compel the observance in the future of the restrictions agreed upon. (Comp. Köhler in *Archiv für Bürgerliches Recht*, vol. 5, pp. 218, etc.; Aschrott in *Braun's Archiv für Soziale Gesetzgebung*, vol. 2, p. 383.)

As there is here only a fine demanded for the violation of the contract made in the past, there is only to be discussed whether in combinations of tradespeople (to which the plaintiff combination belongs) is to be considered legal the imposing of possible fines which the members agree to, with the object of making more certain the fulfillment of their obligations.

This question left undecided by the I Civil Senate of the imperial court in the above-cited decision of June 25, 1890 (vol. 28, p. 244), and affirmatively answered in the other German decisions, in the given case was also affirmatively decided by the supreme court. It is therefore accepted as certain by the imperial court that nothing can be found in the Saxon law against the legal standing of the demand. The fact that the lower court of justice has not based its opinion more in detail can not give rise to objection against the disputed decision, as no objection arose in the direction indicated in the lower courts.

But the denial of legal protection to the claim could be deduced from the revisable legal norms (*rechtsnormen*) only under the assumption that the prescription given in section 152 of the industrial law for the agreements mentioned there that neither complaint nor protest should come to pass from them, finds a corresponding application to the contract of the kind here discussed. Such assumption, however, appears not justified.

At the time of the issue of the industrial law of 1869, combinations of tradespeople for regulating their production and maintaining prices were not of such frequent and wide occurrence as now.

(Comp. Grossman, *Über Industrielle Kartelle*; Steinman-Bucher, *Wesen und Bedeutung der gewerblichen Kartelle*, in *Schmollers Jahrbuch für Gesetzgebung*, vol. 15, pp. 237, etc., 451, etc.; further, the above mentioned *Schriften des Vereins für Sozialpolitik*, vol. 60, Part I, Germany, and Part II, foreign countries; Cohn in *Braun's Archiv für soziale Gesetzgebung*, vol. 8, pp. 396, etc.; *Pöhl in den preussischen Jahrbüchern*, vol. 85, pp. 407, etc.)

Such combinations were not by any means entirely unknown before; they were even more than once the object of legislation. (Compare the papers above adduced by Claudio Jannet, Jollos, *Levy v. Halle*, das *österreichische Strafgesetzbuch* of May 27, 1852, sections 479, 480; also the Prussian *Allgemeine Landrecht* II, 8, section 199.) Many combinations of the kind here discussed arose, especially in Germany, at the time when the project of the industrial law was proposed and discussed. (Compare Schönkank in his treatise mentioned above, in the first place, pp. 494, 495; Wurst in *Schriften des Vereins für Sozialpolitik*, vol. 60, Part I, pp. 137, etc.; *Die Kartelle der deutschen Saline*.)

It can not be assumed that these combinations remained unknown to the legislative bodies; when, however, the industrial law does not contain any provision concerning such combinations and agreements, while the denial of legal protection for the agreements considered in section 152 is particularly expressed, it must be inferred from this that it was not desirable to introduce a similar regulation concerning the combinations discussed here; that they must consequently be judged exclusively according to the common civil law,

and suits could be brought on the ground of these agreements in so far as there are no general principles of jurisprudence in their way.

The defendant further attacked the disputed decision on the ground that his plea that he withdrew from the plaintiff combination before the sale which is charged to him as violation of the contract received no consideration.

The defendant informed, as is indisputable, the chairman of the committee of the combination in a letter of December 1, 1894, that he could not belong longer to the association, and finds himself compelled, from January 1 and onward, to deliver his commodities independently to the buyer. The previous instance (lower court) supposes that this declaration had not had as a consequence the termination of the membership of the defendant, and bases this opinion on section 1381 (Saxon B. G. B.) where conditions are stated under which an association which is formed for a limited time may be dissolved before the expiration of the term by one of the contracting parties. This way of argument would be unsatisfactory if it could be assumed that according to the Imperial legal (judicial) norms a contract, such as is here under discussion, even when it is concluded for a limited time, can be annulled by each party at any time when it chooses. The view that this must follow from the principle of industrial freedom is, it is true, defended in literature; especially Kohler in his treatise already above mentioned (*Archiv für Bürgerliches Recht*, vol. 5, p. 218 and ff., and *Aus dem Patent- und Industrierecht*, I. Teil, p. 87) has expressed, that to each party agreeing to such a contract must be granted the right "to attain again its natural freedom" by withdrawal at any time from the contract. He deduces this from the consideration that the reverse would be in antagonism with the free development of trade and would put obstacles to the industry of individuals.

This view can not be agreed to. If, as was explained above, the principle of industrial freedom in its twofold nature as a protection of the welfare of the community against the self-interest of individuals and as a guaranty of individual freedom is not consistent with "the inviolability of the free play of economic forces, i. e., that the tradespeople can not be allowed the right of regulating in the way of mutual self-help the activity of these forces and preventing excesses which may be considered injurious" (Comp. Decis. of Imp. Court in Civil Cases, vol. 28, p. 244), then also the conclusion can not be drawn from this principle that each individual entrepreneur can renounce in the future the obligation which he undertook with the view of mutual self-help by simply declaring that through these obligations the free play of the economic forces is impaired and he is hampered in his industry. With no more right can it be deduced from the industrial law or other revisable legal norms that the defendant, as he wishes to make believe, had to withdraw from the association for the reason that by remaining in the same his economic existence would be in danger.

#### APPENDIX VI.

DECISION<sup>a</sup> OF THE STATE COURT (LANDESGERICHT) SITTING AT BOCHUM, JULY 12, 1899.—RHENISH-WESTPHALIAN COAL SYNDICATE v. UNITED HANNIBAL ASSOCIATION (FRIED. KRUPP).

With the circumstance that since 1898 the coal output in the Dortmund Superior mining district is no longer sufficient to cover the demand for coal, the number of cases has increased in which iron foundries and other works whose activity depends upon a uniform supply of coal have sought by the purchase of coal mines to secure to themselves the right of controlling absolutely the produce of the said mines. In the spring of this year the Hoesch Iron and Steel Works of Dortmund purchased the United Westphalia mine with this end in view. The firm of Friedrich Krupp, of Essen, also bought up the United Hannibal coal mine at Elckel, while at the present time (August, 1899) the Société Anonyme des Hauts-Fourneaux of Differdingen (Blast Furnace Limited Liability Company), a Lorraine company, has under advanced consideration the purchase of the Dannenbaum Joint Stock Mining Company of Bochum. In case mines purchased for this purpose belong to the syndicate, which is true in the cases of all three of the mines mentioned above, the

<sup>a</sup> Jahrbuch für den Oberbergamtsbezirk Dortmund, pp. 69-71.

Rhenish-Westphalian Coal Syndicate takes the position that according to section 1, paragraph 1, of the syndicate agreement of July 31, 1896, these mines are bound to continue to place their output at the disposal of the syndicate until the end of the term agreed upon, i. e., December 31, 1905, and their new owners therefore must continue as before to draw their supply of coal through the syndicate. On account of the importance of the principles involved the question was brought to judicial decision. A decision favorable to the syndicate was obtained in the court of first instance in the cases of Coal Syndicate *v.* The United Westphalia Mine Association (Hoesch Iron and Steel Works) and the United Hannibal Association (Fried. Krupp).

#### APPENDIX I.

##### THE TRUST BILL<sup>a</sup> SUBMITTED BY THE GOVERNMENT TO THE LEGISLATIVE BODIES.

SECTION 1. Whenever independent enterprises unite themselves for the purpose of influencing the conditions of production, price, and consumption of such articles of consumption which, like sugar, brandy, beer, oil from minerals, and salt, are subject to an excise, such alliances of enterprises (trusts), according to this act, are to be subject to the supervision of the Government.

The same governmental supervision takes place over agreements between two or more home trusts and over agreements between domestic trusts and similar organizations in foreign countries.

SEC. 2. A trust, in order to be valid, requires in all cases a statement, under a notary's acknowledgment, of the following details:

- (1) Purpose and object of the trust.
- (2) Branch of trade and number of members of the trust; name of each.
- (3) Privileges and obligations of the members and contracts or agreements entered into by the members as to penalties, etc.
- (4) Seat of the trust (office of the home management) or, should it be a foreign trust, the name of the manager and his place of residence in Austria must be given.
- (5) Management and general features of the business done.
- (6) Names of the foreign representatives, if there are any.
- (7) Duration of the agreement made by the trust members.
- (8) Eventual agreement as to the way of settling litigations arising from the trust.

SEC. 3. The provisions of the act of April 7, 1870, section 2 (law of coalition), as far as they concern agreements on prices of wares, under section 4 of the same act, as to trusts concerned in the proposed act, are hereby annulled; the other provisions of the first-mentioned act stand valid.

Any kind of agreements or settlements mentioned, either by statute or by resolution of trusts, are prohibited; any other provisions on associations and unions stand untouched by these presents.

SEC. 4. Notice must be given to the authorities of all statutes of trusts. Within eight days, at most, subsequent to executing the statutes of trusts notice is to be given to the ministry of finance. The validity of the statute of trusts, or any amendment to the same, especially any calling of sessions of members of trusts, require the authentication of a notary; these facts and also the dissolution of trusts are to be given notice of in the same way.

The notary shall present within eight days the statute or any modification of it to the ministry of finance in five authenticated copies.

A new trust is not permitted to take action, nor are any of the statutes efficacious, earlier than a fortnight prior to the presenting of the notice.

Any resolution relative to the fixing of prices, quantity of production, etc., is to be reported to the ministry of finance not later than one day after formation of the resolution.

SEC. 5. The members of the trusts are obliged to have the notification provided for in section 4 made in person or by a specially empowered attorney or representative.

<sup>a</sup> The translation of the text of the bill itself is taken from United States Consular Reports, Vol. LV, p. 47; the explanations are translated for the Industrial Commission.

SEC. 6. The governmental supervision over the trusts mentioned in section 1 is to be managed by the ministry of finance.

It is authorized to examine for this purpose any commercial books of the trusts and notes of the business transacted by the same, and to demand from its directors, managers, and the interested enterprises any information respecting any business relation, external or among the members.

The obligation of giving information shall not be extended to any technical contrivances and procedures.

SEC. 7. The ministry of finance is authorized to prohibit the execution of resolutions of trusts (mentioned in section 4) if they are apt to cause increase or decrease in prices of goods or services to the injury of the producers or performers (unless the resolutions have for object to effect economy in branches of industry by the establishment of prices and in view of the condition of competition), on account of the damage to the capacity of consumption, to taxation, and to the proceeds of excises which may result from such resolutions. For the said reasons the existence of a trust and any alteration of the statutes can be annulled if the trust has one of the aforesaid objects. In these cases the manager of the trust and representatives of the branch of trade are to be heard.

The ministry of finance has to decide, after careful examination, whether or not the circumstances are those provided for in the law. A trust trespassing on the provisions of section 3, paragraph 2, is to be annulled by the ministry of finance.

SEC. 8. The existence of a trust, any modification of its statutes, or resolution named in the last sentence of section 4 having been annulled by the ministry of finance on the ground of this act (sections 7, 13, and 19), becomes illegal, and the statutes, amendments, or resolutions (section 4) shall be void.

SEC. 9. The ministry of finance is authorized to order at any time the managers of a trust to give bond, the amount of which is to be fixed in accordance with the extent of trades under the trust, but never exceeding 200,000 florins. This bond is to serve as security for the conformity of the trust to the provision of this act (section 19). The method of giving and depositing the bond will be controlled by special decree.

SEC. 10. A special committee, consisting of twelve members and presided over by the minister himself, or a substitute designated by him, is to be formed in the ministry of finance. Of these members, half will be selected by the minister from among officials of the ministry of finance and other ministries concerned. The other half are to be selected from the professions to act for a certain period. Tax or excise officers are not allowed to be members of this committee.

Prior to any decision (section 7) prohibiting a trust or a resolution of a trust by the ministry of finance, the opinion of the committee is to be heard.

The ministry of finance, according to this act, is entitled to confer upon the committee the superintendence of the trusts, above-mentioned decisions excepted.

The ministry of finance or the committee in charge is authorized to employ one or more commissioners, designated for special cases or for permanent service, to exercise governmental supervision. They have the authority noted in section 6, paragraph 2, to make the necessary inquiries, and they, too, shall not be selected from among tax officials. Particular provisions as to the selection and the nature of practice of the committee and as to the privileges of the commissioner will be issued by special decree.

SEC. 11. The members of the committee and the commissioners are bound by oath to secrecy, unless they are acting Government officers, who are bound by official oath to keep secret any official business. Duty of secrecy especially involves strict silence as to any object of business or trade.

SEC. 12. This law applies to trusts (section 1) already in existence, and they have to give notice (section 4) within a month from the day they begin work.

SEC. 13. Should one of the notifications provided in sections 4 and 12 be omitted within the fixed period, any manager, member of a trust, legal representative of the companies, or their attorneys shall suffer for such an omission for any special case a disciplinary fine of not exceeding 2,000 florins. In the same manner the notary is to be fined who omits the performance of duty as provided in section 4.

When the persons aforesaid refuse to give information asked by the Government, they shall be punished by a fine up to 1,000 florins. On a repeated refusal the ministry of finance may annul the existence of the trust.

SEC. 14. Whoever gives false or essentially incomplete information on points important for the consideration of the actions of the trust (whether by design or gross carelessness) is guilty of an offense and is to be punished with im-

prisonment of from eight days to three months and with a fine of from 100 to 5,000 florins.

SEC. 15. Whoever participates in the activity of a trust (section 1) designedly or by gross error—

(1) In spite of the Government's prohibition or prior to expiration of the requisite time provided in section 4;

(2) Whoever carries into effect a resolution of a trust which is prohibited by the Government;

(3) Whoever participates in a trust having taken action (a) on the ground of a statute of which the Government has not been notified, (b) without considering the provisions of the statute, (c) under an agreement of a trust which differs from that contained in the statutes, or (d) without any statute;

(4) Who trespasses on the provisions of section 3, paragraph 2, is also guilty of an offense and shall be punished with one to six months' imprisonment and with a fine of from 200 up to 10,000 florins.

SEC. 16. Members of the committee not belonging to the corporation of Government officials having trespassed on the duty of secrecy shall be removed at once from their functions by the ministry of finance.

If aggravated circumstances supervene they are further to be fined up to 1,000 florins. Government officials committing indiscretions in official business are to be punished according to disciplinary provisions.

SEC. 17. The authorities of the country (magistrates) can inflict the aforesaid fines (secs. 13 and 14, par. 2), but appeals can be made within two weeks to the ministry of finance. The cases are to be tried in the district where the offense has been committed. The disciplinary fines go to the imperial treasury. Offenses named in sections 14 and 15 are submitted to the jurisdiction of the common-law courts.

SEC. 18. The manager of a trade is responsible jointly for any disciplinary fine inflicted upon his representative, according to the present law, and likewise for any fine against his attorney, on account of an offense (sec. 14) committed in presenting the proper notice.

The manager is answerable jointly for the fines for other trespasses inflicted on the ground of the present act, if the trespass has been committed by his own order, with his knowledge, or if it could have been prevented by his due care and attention. The responsible person is to be summoned to the civil-law court.

SEC. 19. The bond given by the management of the trust is held as security for all disciplinary or other fines inflicted from the time of the deposit of the bond against any manager, member, or representative. The Government has first claim on the bond for fines.

In the cases of section 15, paragraphs (1) and (2), the ministry of finance, after having heard the committee (sec. 10), is authorized to declare the bond forfeited in whole or in part.

The bonds forfeited go to the imperial treasury, unless the bond has been deposited a fortnight after the order of the ministry of finance was issued, or has been supplied to the full amount after the forfeiture. The ministry of finance shall be authorized to prohibit the existence of the trust or to cause the missing amount of the bond to be collected.

SEC. 20. The ministers of finance, of interior, of justice, and of commerce and agriculture are ordered to carry this act into effect, which becomes valid with the day of its publication.

## APPENDIX II.

### EXPLANATION OF BILL RELATING TO AUSTRIAN TRUSTS.

*Introduction.*—The establishment of combinations of capitalists for the purpose of mitigating or removing the harmful effects of free competition and substituting in its place, through a preconcerted and united action of the members of such a combination, conditions of production, prices, or sales as favorable as possible to such members, is taking place in Austria since comparatively recent times in ever-increasing measure. Although exhaustive statements about the spread and growth of these combinations are wanting, there can be no doubt that this development is taking place with the greatest rapidity; that combinations of employers occur in all spheres of business, in the sphere of production, of commerce and trade, and of insurance; that they are just as frequent



in the case of finished products ready for use as with the partly finished, raw, and auxiliary materials, etc.; in short, that they have become one of the most important phenomena of our economic life and have scarcely left untouched by their efforts a single branch of industry. The cause for this rapid spread is probably to be found to a great extent in the fact that modern industry is built up in a continually more perfect development of the principle of division of labor, and that, therefore, combinations of producers of the finished products easily lead to very similar combinations of those producing the things necessary for the manufacture of these products.

Like similar combinations of capitalists in foreign countries, these combinations (usually designated as combinations or cartels in the widest sense of the word), following the trend of modern economical development, aim at securing the advantage of the individual capitalist by creating through contracts, through formal agreements of organization, an economic organism in which the individual capitalist must submit to a certain self-imposed restriction of his liberty in favor of all the participants. The individual may in this case pursue his advantage only in so far as it is attainable for all members of the combination, and as an equivalent for this self-imposed restriction this advantage is assured to the capitalist, though possibly in a smaller measure, and the possibility offered to him to make his calculations with definite factors instead of the incalculable conditions of the market, and to eliminate at least a few of the numerous unknown quantities which, more or less, every undertaking has to take into account, considering the relation of our industries with those of the world. The conviction has triumphed that individual economic prosperity can be assured more easily through such combinations, through creating an economic collective power, and through subordination to a common interest, than through unrestrained individual effort, which under the system of free competition may often, though only for a short period, prove more profitable.

To be sure, it can not be denied that the abuses arising from free competition have in some spheres of industrial life reached such a degree that the capitalists were compelled by sheer force of circumstances to unite their economic powers. Such combinations (Cartell-Verelnigungen) represent primarily an act of economic self-help, an expression of the beneficent idea of association, which in such, as in other cases, has brought about useful results, not only for individual interests, but also for the community. Though, then, beyond doubt, many of such combinations have a sound kernel in their firm and sound organization, and although they may at times have beneficial results, still contrary effects have recently made themselves so strongly felt and have become so impressed on the public mind that combinations are usually judged with reference to their harmfulness, and that the Government has been more and more frequently and urgently called upon for measures against them. This was done in numerous interpellations and resolutions of the Imperial Diet and the provincial parliaments, in resolutions of chambers of commerce (Gewerbe-Kammern), in (public) meetings, in the press, etc.

These impulses, coming from various directions, which must probably be regarded as an expression of prevalent public opinion, have confirmed the Government in its conviction of the necessity of legal regulation of combinations. The practical difficulties, which were due principally to the novel character of the subject, and which, up to date, had not been *ex professo* legally dealt with by any State (if the American legislation, which was not applicable to our conditions, be excepted), made it expedient to analyze the various industrial branches and to single out those in which the formation of combinations is of particular significance from the point of view of taxation and social effect on the masses (sociale Massenwirkungen). From this critical analysis it became clear that the abuses of combinations have nowhere else become so sensible as in certain common articles (Massenartikeln) of daily use which are liable to an indirect tax in close connection with their industrial production. Then it became perfectly apparent that combinations might seriously endanger the aims of certain schemes of taxation which were of weight in determining the rate of certain indirect taxes, and, furthermore, that combinations have even endangered in these spheres important interests of the State treasury and of large masses of the consumers. This was then the most weighty consideration that determined the Government, in fulfillment of its duties toward the interests of the State treasury and as guardian of the common weal, to stake off as a reservation the sphere of these articles of consumption subject to the indirect taxes mentioned and to make it the subject of legal regulation. This regulation appears to the Government to be a necessity to prevent the burden imposed on

the consumer by the present system of indirect taxation of these articles being increased by private organizations, against the purposes of revenue legislation and in a manner harmful to the community. Such considerations must have the more influence with the Government at a time when the same, from important reasons of State interest, is confronted by the necessity of increasing the indirect taxes on these articles. Under these conditions the Government considered it an absolute duty to prevent the resources of the people being drawn upon beyond the necessary burden of taxation by private agreements that practically aim at the imposition on the consumer of compulsory sacrifices in the nature of indirect taxes.

*Combinations and rings.*—In spite of the above-mentioned delimitation of the field chosen for legal regulation, the different phenomena and effects which combinations in general show were also to be considered. Combinations which have already become at the present day, as an economic type, constant collective phenomena, have shown the most varied development, extending in all possible directions, and have, under different external conditions, produced very different effects. Thus it happens that very different things are understood under the name of combinations, and from this it also follows that the question, frequently quite general, whether trusts are useful or harmful, can not be answered concisely. For if one asserts in an offhand fashion the usefulness or harmfulness of combinations, it is still anything but clear to what such statements refer—whether to the capitalist or to the workingman, or the population, etc. But in order to be able to judge whether combinations are useful or harmful to the community it is necessary to distinguish between different kinds of combinations. Public opinion does this instinctively by designating one form of combinations as rings and the other as combinations in the narrower sense of the word. With this distinction the opinion has become established that the rings, but not the combinations, in the narrower sense of the word, are harmful to the community. The most important distinction between these two forms consists in this: That the ring is an instrument for the sale of wares, while the combination is an instrument for the production of wares. In spite of the prevailing opinion that the rings are harmful to the community, this harmfulness can not pass for a definite characteristic, and even if public opinion is on the right track in so far as the rings are certainly in the majority of cases instruments of speculative abuses of a nature harmful to the community (like the copper ring or the former maize and oats ring of Austria), still cases are conceivable where combinations of dealers pursue aims which in no wise injuriously affect the interests of the community, so, for the sake of example, when an opposition ring was formed to uphold the rate of exchange of Government securities against a ring of speculators who tried to depress it, or if (to cite another example) combinations are entered into, as was recently done by a syndicate of banks in the United States of America to counteract a depreciation of domestic currency by uniting to bring in foreign money. Likewise it is possible to conceive of combinations of exporters who, to preserve the reputation of domestic trade with foreign countries, agree not to sell an inferior class of wares, etc.

Only such combinations can probably be designated as harmful to the community that buy up a commodity or obtain deliveries in order to raise the prices of this commodity, through complete or partial closing of the markets, beyond its normal rate; or which, through fictitious sales or delivery, depress prices beneath their normal rates in order to supply themselves at these depressed prices—which do all this to obtain, through falsifying the state of the markets, unjustified gains. The peculiarity of the ring, therefore, is this: That speculators combine in order to falsify in their favor, in the manner stated, the state of the markets. It may already be mentioned here that the regulation of the special question now under consideration includes both classes of combinations, the rings and the combinations (proper).

*Usefulness or harmfulness.*—In judging the combinations in the narrower sense of the word also, the question of their usefulness or harmfulness calls for investigation, for the position of the public authorities toward the combinations depends on the answer to this question. But, as already stated, a concise logical subdividing of combinations for the purposes of regulation, according to external distinctions—for example, according to categories like "combinations of production," "combinations of prices," "combinations of selling," etc.—can not be attempted, but a critical examination of combinations according to their economic purposes rather is necessary. It is a different thing whether a combination wishes solely to make economic gains corresponding to the state of the markets and to prevent losses of a normal character, or whether it attempts

to obtain a monopolistic supremacy in the market, in order that it may carry on a monopolistic policy of prices, falsify the state of the market, and thus obtain exorbitant gains. The true and practical criterion for a classification of combinations can be found only in the purposes of a combination. From this point of view one can divide them—

1. Into such as attempt to reduce uneconomic conditions produced by free competition (such as overproduction, cutthroat competition, excessive underbidding to get orders, excessive expense of advertising, etc.) and consequent abuses (loss of capital in enterprises, gluts in the market, lowering of wages, discharge of workmen, etc.) to economic conditions (i. e., corresponding to the existing economic situation). This refers particularly to prices; and,

2. Into such that attempt to establish a *de facto* monopoly in order to obtain excessive earnings, excessive prices, not corresponding to the economic situation, or in order to restrict the production of commodities in an uneconomic manner.

There can be no doubt that combinations of the former kind are useful, and even deserving of encouragement. For, in so far as they keep within the limits established by the existing economic conditions, they can have a salutary regulating influence on the whole industrial world, by insuring a certain stability of production, by adapting the quantity of production to the demand, and so, perhaps, actually bringing about a transition from a condition of irregular production to an economically more perfect, regulated production. On the other hand, there can be but little doubt about the general harmfulness of the second kind of combinations.

In this attempt to distinguish combinations critically, the difficult question, to be sure, remains unanswered: What are economic conditions corresponding to the existing economic situation, and what is the contrary? There is a fair and an unfair speculation; there is a fair and an unfair competition; there is fair interest and usurious interest; there is also economic production and its contrary. If one can determine all these conditions, why should it be impossible to find a standard for estimating what conditions (particularly prices) correspond to the existing economic situation? It should also be remembered that here, in spite of the economic character of the subject, moral standards also apply, the definitions of which can not be determined from certain external characteristics, like degrees of temperature on the scale of a thermometer. These moral standards, on the contrary, shade off, on practical application, one into the other, but they nevertheless show undeniable distinctions or even strong contrasts. As little as there are sharp distinctions between genuine enterprise and daring speculation, between economy and avarice (although such contrasts doubtless exist and are formed in all economic conditions), just as little can the want of such sharp delimitation in the matter under consideration be regarded as an obstacle against taking the aforementioned contrasts as a starting point and basing the practical application of them on the difference of the individual cases.

In all such cases a question of facts will arise upon which, in every individual case, an organ of the State especially adapted for the solution of these problems will decide. The Government intends to make this institution of such a character that it will not only possess professional competence and reliability of judgment, but that the same will also be in a position to command, by the way in which it is selected, a high degree of authority in the eyes of the public. (Cf. the comments on sec. 11.)

The Government can not resist the conviction that combinations contain from their very nature the germs of excrescences, and that a most suitable soil for these excrescences is to be found in the midst of the class hatred and class feuds that prevail throughout the whole social body. A quite uncontrolled development of combinations leaves room for the possibility that the danger of uneconomic prices, uneconomic earnings, and uneconomic restriction of production should become an abuse threatening the whole economic life. Although this development has not reached a climax up to the present, nevertheless the Government considers itself obliged to take positive measures, already at this point, with a view to the abuses already existing, as well as with a view to the aforesaid possibility of future developments. The thought of Government interference thus broached leads up to the frequently ventilated question whether the State can or should interfere in this matter.

*Principles of State interference.*—The right of the State to interfere has been denied from various sides, and the opinion is not infrequently expressed that the modern State, with its present institutions founded mainly on the idea of the so-called constitutional state (*Rechtsstaat*), must refrain from such a

serious interference with economic conditions. So much is certain that as a result of the rapid emergence of social questions modern states have been confronted with a problem which in difficulty of solution has possibly no equal in history. From this point of view alone it is clear why the responsible circles approach the legislative treatment of the great social problems only with the greatest care. But it were an illogical conclusion to derive from such circumstance treatment the conclusion that the modern state is not adapted for economic interference, and this would be directly contrary to established facts. It will probably be sufficient to recall the modern social legislation of Austria in order to show that we are already in a stage of development that has long ago outstripped such scruples. This very legislation is a proof of the fact that the idea of interference, through the power of the State, in social conditions can be adapted to the most difficult forms of modern social economy; that the State is zealously intent to bring its administration in this point also to a level with the highest requirements of the times.

If, now, doubts about the power of the modern State to interfere in reference to this point can not be entertained, the question of expediency demands a detailed consideration.

As already mentioned, the Government has determined, with forethought, to mark off a regular segment of the province of combinations and to experiment on the same with the legislative regulation of combinations. The principal reason leading to this determination is that precisely those combinations that deal in certain articles of consumption subject to indirect taxation have developed abuses and economic dangers that make the interference of Government appear a peremptory command of political necessity. The interests falling within the sphere of the administration of finances urgently call for legislative measures in their protection, for these combinations affect the whole management, organization, and success of important and rich revenue-yielding undertakings in a manner justly regarded by the public as a serious abuse, so that legislative regulation of this matter, more than any other, does not permit of any longer postponement.

*Sugar cartel.*—With reference to this it is sufficient to call attention to the sugar cartel, the development of which is most significant in regard to all the points discussed. The Government does not at all refuse a hearing to the arguments made in favor of the sugar cartel, and it recognizes particularly that its existence assures a certain stability of the sugar industry (so important for our economic life and particularly for agriculture) and of the other industrial pursuits with it or depending on it. Although the Government does not disregard this aspect of the case, all the more since it has, as before stated, always considered their industrial services in judging the combinations, nevertheless the complaints about the oppressive effects of the sugar cartel upon the consumer and the beet-growing population could not be refused a serious consideration. It is well known that this combination has used the favored position accorded to the sugar industry by a protective tariff to keep the price of refined sugar for home use at a level which frequently exceeds considerably the price of production and reasonable private earnings.

The sugar industry is one of the industries receiving support from the state by means of open export premiums. This premium not only encourages export, but increases the rates at home, the price of refined sugar for home consumption being raised, over against the price in the markets of the world, by the amount of the legal premium. It follows from this effect of the export premium that consumers in Austria-Hungary must pay dearer for their sugar, in spite of overproduction, than the consumers of other countries. If this state of affairs is aggravated by the fact that the refiners of sugar make agreements to still further raise the price of refined sugar, then it is hard to deny a certain justification to an opposition against such combination.

The economic aims of our legislative revenue and premium policy have been seriously injured from this cause, in spite of the burdens imposed upon the community for the sake of these industries.

There is one thing very apparent about the sugar cartel, namely, a number of effects that must be expected to appear in the whole sphere of industrial production of those articles subject to indirect taxation, as soon as economic conditions favor in a like manner the formation of combinations.

*Economic reactions.*—It is self-evident that such combinations affect unfavorably the consumption and consuming power of the population. When the producers of articles in daily use unite to furnish them only at a price that is higher than it would be without a combination, they compel the population,

through their practical monopoly, to pay them a higher rate, an actual cartel premium.

Of course this, often enough arbitrary, increase of prices must materially impair the consuming power, and as far as the consumption of the articles under the control of combinations keeps on a certain level, in spite of much greater strain on the consuming power, then this is accompanied by a disproportionately greater burdening of the consumer solely for the advantage of the combined capitalists. As a further consequence, the consuming power of the population in general, the standard of living, and the economic development of the classes concerned are affected detrimentally.

Just so much as the resources of the population are taxed increasingly in favor of private enterprise, their resources naturally decrease in their relation to the state. Whenever this happens it thwarts those principles of revenue policy which are often applied in enacting indirect taxes, such, for instance, as that on the economic ground of sparing the consuming power the tax rate should not be fixed higher than a given point. More than this, the same economic condition is produced as under a higher rate of taxation, only with this difference, that the increase in receipts, due to a greater burden on consumption, does not flow into the treasury of the state, but into the pockets of the members of the combination.

The whole manner of such organized combination, and particularly the fixing of the prices, amounts to drawing upon the resources of the population in a way resembling a Government revenue monopoly. Now, it lies in the nature of the modern state and it may also be regarded as an introvertible assertion of modern financial science, that a monopoly shall exist only as a state monopoly and for the purpose of raising certain indirect taxes. From this it follows, furthermore, that in the sphere of private economy similar developments having the essential characteristics of a monopoly should never come into existence and find recognition through private agreements, but solely through legislative power. This view of the question puts into even stronger light the inadmissibility of the present unblinded interference of the combinations with the entire economic life and even with the financial sovereignty of the state.

A further effect of combinations in this sphere is frequently the restriction of production of the various articles of consumption, which is resorted to to preserve prices at a certain level. In the first place, this opens up the possibility of a decrease of consumption; but, besides, a decrease in the number of workmen (workmen proper as well as brain workers) usually takes place in the industries under the control of combinations, or the wages are lowered, which brings about a further decrease in consumption. The effect on the revenue of the state is quite apparent also in this way.

But combinations contain dangerous possibilities, not only in regard to indirect taxation but in reference to direct taxation as well. It is an effect of combinations, positively established, though probably not always foreseen and intended, that they impede or even hinder the establishment of new industrial enterprises, since the combination frequently directs its whole undivided strength against outside, particularly new, enterprises. Furthermore, the possibility of competition with capitalists united in a combination is more than formerly dependent on the possession of capital. An unfavorable influence on the revenues and the natural growth of tax receipts is seriously to be feared from these effects of combination.

An unblinded development of combinations in the sphere mentioned leads to fears of an economically harmful influencing of the distribution of incomes. The compact and exclusive character of the combinations might easily bring it about that the rise of workmen—of the artisans and the brain workers—now employed in the managing and planning of the enterprises into independent undertakers is made more difficult, or possibly, in the one or the other branch, impossible. Such a condition would clearly affect seriously the distribution of income and consequently, in its final results, the entire revenue system of the state, not to mention social effects.

But apart from these grounds of revenue policy reasons of a general nature also speak in favor of state interference.

The attempt to curtail or do away with free competition, the fundamental principle of the present economic structure according to prevalent scientific views, is a general characteristic of combinations. But just as the state considers it more and more its duty to resist any infraction of this principle by taking measures against unfair competition, on the other hand weighty con-

siderations compel it to combat the preventing or impairing of a fair competition as soon as these forces become to a considerable degree a social evil. In these tendencies is expressed the common aim of all combinations, however different they may be in external appearance. It is not without significance that the opponents of our present social order have made special observation of this throttling of free competition through combinations and have rested on it, here and there, definite hopes for their plans of a socialistic state of the future.

Assuming an unhindered development of combinations, it is difficult to avoid feeling some concern as to whether technical improvements in production would continue to inure to the benefit of the community. It did not seem necessary to test the correctness of the claim that the certainty of gains obtained without increased enterprise and the resulting relaxation of industrial activity might lead to a general retardation of technical progress in production; but nevertheless there is a danger that the economic benefits of these improvements resulting from the decrease in the cost of production, with absolutely stable prices of the finished product, will not benefit the community, but will solely increase the undertaker's gain through a decrease of the difference between the cost of production and the price of sale.

The knowledge of these facts might in our time aggravate still more the attacks which are made even on a legitimate undertaker's profit. It would indeed be easier to claim, particularly when whole industries are combined, that the industrial undertaker was saved an amount of intellectual labor otherwise necessary (information, calculation, disposition, management), which is the essential characteristic of his activity, and also in consequence the just title to the undertaker's earnings. It might, indeed, go so far, if the system of combinations develops and expands uncontrolled, that, instead of the fluctuating gains representing the success of the undertaker's efforts, a fixed rate would become prevalent, a kind of an undertaker's annuity, so that the undertaker's profit would undergo, as it were, a transition from the fluid into the solid state.

A number of these socially injurious results of combinations are attended, furthermore, with certain other effects, namely, a lessening of the stimulus and the opportunity to employ capital in industrial and other enterprises. This effects an interruption in the circulation of capital essential to sound conditions of social economy, as well as a disturbance of the necessary balance in the distribution of capital. Furthermore, available capital is forced into investments paying a fixed rate of interest, and the lowering of the rate of interest, which of course is to be welcomed from a social point of view, takes place, in consequence by bounds and leaps instead of in stable development, as is desirable. Finally, business enterprise and initiative, which unfortunately are as yet little developed with us, will be still more checked; and in the place of capital employed in the labor of its owner the sphere of interest for use of capital by others—that is, the sphere of income without labor—is enlarged excessively. Many of these points discussed can be summed up in the words that, just as the combinations represent the most advanced form of organizations of capital in modern development so they are also felt to be an improved instrument of the ascendancy of capital over against economically weaker circles. This is the case not only with a view to the great mass of consumers, but especially with a view to the workmen employed in the industrial branches which are in the hands of combinations.

These are much hampered in their freedom of labor when instead of a number of separate enterprises they find themselves confronted with a concentrated management comprehending the whole branch of production; and they fall into a condition of greater dependence upon their employers, by which fact class feelings might be seriously aggravated.

For all these reasons State interference is perfectly justified. It is, by the way, not without precedent. Even if we leave out of account the historical development of our State, which shows numerous similar legislative regulations of economic problems (although the full significance of these was probably not realized in most cases), the present stage of development shows a number of quite important spheres where the State interferes, for public reasons, with the free economic activity of the individual. It is probably sufficient in this connection to recall the well-known cases of mining, forestry, and in a certain sense also the private railways.

*Forms of State interference.*—If the necessity of State interference is granted, the question arises in what forms this interference shall take place? One

could think of two types: One in the economic, the other in the legal sphere. The economic interference has usually been proposed in the form of a lowering of the protective tariff. Apart from the fact that in consequence of the customs and commercial union with Hungary, a modification of the duties fixed in the tariff can not be made by one party, such a measure can not be considered, because it would endanger the prosperity and existence of whole industries for the sake of preventing temporary abuses, and would introduce uncertainty and rapid changes into the desirable stability of production and of commerce and trade. Besides such a lowering of the tariff would essentially amount to a penal measure, and, in direct contradiction to the fundamental requirement of all punishment, that it should be meted out only to the guilty, it would be an unjust punishment for all undertakers who had not joined the combination, as well as other circles interested in the branches concerned, and it might finally be paralyzed in its effects by the formation of international combinations.

Apart from the matter of taxation, other economic legislative measures against abuses of the combinations are conceivable. Without wishing to assert the applicability of these measures to home conditions, it may be pointed out, for the sake of completeness, that in a great foreign State the administration of finances took action against the sugar cartel by becoming itself an importer of refined sugar. Likewise the establishment of State enterprises in competition would be imaginable in the branch of production concerned, and complete State ownership of the industrial branch would be the final development of this principle. It scarcely calls for special mention that the economic conditions of our country do not yet call for such extreme measures, and that, as will be shown hereafter, quite efficient and not so radical measures in another direction are at our disposal.

The second type of interference falls within the legal sphere. Three things have been proposed under this head: (1) Interference by penal law; (2) by civil law; (3) by administrative law.

*I. Penal law.*—The combinations do not furnish a tangible and promising basis for treatment under penal law; in fact, all attempts of this kind from the provisions of Justinian's Code up to the most modern American antitrust legislation are a succession of failures.

In Austria the penal law of the year 1803, whose provisions (secs. 227 to 229) have been continued in the penal law of the year 1852 (secs. 479 to 481), has already attempted a regulation of this question by declaring agreements of artisans, manufacturers, etc., in regard to fixing the prices of goods or wages to the disadvantage of the public or the workmen, and also the withholding of wares from the market, as penal offenses. This treatment under penal law in Austria originated about the time when similar provisions were made by the Prussian code (*Landrecht*) and the French code pénal. Their inefficiency has been proved in all these jurisdictions alike, and has everywhere left a demand for more efficient legislation.

In Austria the law on coalitions of April 7, 1870 (R. G. B. No. 43), was supposed to fulfill the requirements. It changed the punishable facts against former conditions in such a way that no longer agreements as such, but only certain forbidden means to bring about such agreements or to preserve them (threats, intimidation, force) were declared punishable. The law on coalitions abstains from a treatment of agreements themselves by penal law, and affects them solely by nullification in civil law.

These provisions of the law on coalitions furnished, as is well known, no efficient means for combating the socially harmful abuses of combination of undertakers. The same is true of the well-known article 419 of the French code pénal, which has led to many disputes among jurists, but to no practical results. Last of all, American legislation, which could scarcely be excelled in threats of Draconic penalties, has been an absolute failure.

The principal reason for the inefficiency of these penal experiments is to be found in the difficulty, caused by the peculiar nature of the subject, of obtaining a concise formulation of the punishable facts. Either the definition is too broad, and then the inadvisability of a strict application of the penalties leads, as usual, to laxness, or the definition is too narrow, in which case many things, to begin with, lie outside the limits of the law, and it falls to a great extent in its purposes. The same difficulty presents itself on attempting to fix the severity of the penalty. If the law is too severe, it restricts the whole freedom of industrial life and is not applied; if the severe penalties are confined to the most glaring cases, the whole conception of such penal laws is one sided, and

fails in a large number of cases demanding a legal regulation. But the more difficult a satisfactory definition of the punishable offense is the more difficult is also a judicial condition which by its essential character is tied to the employment of clear definitions and which must necessarily be embarrassed by great and unaccustomed difficulties in trying to judge such complicated economic questions. Finally, the inducements and, as American experience has shown, the success in evading the laws grow in direct proportion to the severity of the penalties.

These experiences always led to such results that now the method of penal repression of combinations is no longer considered adequate by itself.

II. *Civil law*.—The second method of combating the harmful social abuses of combinations leads into the domain of private law. In this domain the measures proposed consist principally of denying to agreements of combinations, more or less completely, efficiency in private law, be it that the right of entering complaint, solely, is denied, be it that the nullity, invalidation, or legal inefficiency is expressly stated. The mere denial of the right of complaint has up to the present, as far as is known, been employed by no legislation, and such a measure would indeed be a half measure and clearly inefficient. Nevertheless, attempts at legislation to establish a norm for the invalidation of the agreements made by combinations are anything but rare. In this category belongs, particularly, the legislation of countries that apply to combinations penal sanctions from which the invalidation of such agreements also in private law follows as a self-evident consequence.

But a solution of the difficulty by civil law is attempted by that legislation which finds protection against the harmful social effects of combinations solely in a refusal to recognize them in civil law. Apart from the principal question still to be considered, namely, that of adequate efficiency of such civil-law provisions, the purely technical side of legislation, namely, the comprehensive formulation of the provisions for the whole subject of combinations, offers some difficulty, and parallel with this difficulty the practical application by the judge will usually be vacillating, if for no other reason on account of the necessary classification of the individual cases under the head of the economic categories made, from which fact the practical efficiency of the law becomes doubtful. An example in point is the law on coalitions of the year 1870, which in its civil-law parts (secs. 2 and 4) does not comprehend the subject of combinations at all exhaustively and has remained almost without application in practice.

As far as the civil-law part of the law on coalitions is concerned, it is, to say the least, doubtful from the wording of section 4 if it is applicable to agreements about the quantity of the output, the dividing up of market territory, and in general to such agreements as effect an increase of prices only indirectly; but it is certain that section 4 of this law does not apply:

(a) To agreements which aim at no increase, but solely at the fixing of the prices of wares, in spite of the appearance of more favorable conditions of production, so that the profits from the conditions of the market are confined solely to the combined undertakers, while the people are excluded from participation in them.

(b) To agreements which concern the purchase price of partially manufactured articles, raw materials, etc., whether by a direct agreement about prices or by a division of the territory of the markets where purchases are made. (Rayonirung.)

(c) To agreements in reference to the more favorable development of other conditions of production, as, for instance, agreements fixing the amount to be paid for transportation, insurance, etc. [Probably referring to discriminating rates of various kinds.]

But even in the remaining limited domain of the applicability of the law on coalitions this law has almost never been applied, since an occasion for asserting the invalidity in civil law of combinations coming under this law has never arisen. Quite naturally, for it is the nature of these organizations that members of the combination need the protection of the State and recognition by the State much less than in most of the other domains of private law. This is the case principally because through the customary means of courts of arbitration an enforcement of contract is possible in spite of the invalidity of an agreement in civil law. It must at least be considered very doubtful whether under the present law of legal procedure the awards of courts of arbitration which refer to the fulfillment of the agreements of a combination can be attacked in their material contents or in their enforcement on account of the



invalid agreements of a combination which is their foundation. A change was indeed brought about with reference to this point through the new legislation relating to suits in civil law by declaring invalid in future (by force of sec. 595, 1, 6, and sec. 598 of the law of August 1, 1895, R. G. B. No. 113) awards of arbitration which violate binding provisions of the law, and, in consequence, also such awards as aim at enforcing an agreement legally invalid according to section 4, and therefore incapable of execution. In reference to the decisions of bourse courts of arbitration, similar provisions have been made by article 25 of the law introducing the civil-law statutes of August 1, 1895 (R. G. B. No. 112), and by article 54 of this introductory law the provisions are already in force.<sup>a</sup>

But even such a perfecting of the sanctions of invalidity in civil law would scarcely be sufficient for combating socially harmful combinations. It is an innate characteristic of combinations that invalidity in private law amounts to but little. For the injury resulting to the members of a combination, both at present and in the future, from an infraction of the agreement would be so considerable that simple considerations of self-interest are sufficient to prevent a breach of the agreement. These interests, as well as considerations of business honor and of trust and faith in business relations, are a firm bond that holds and unites the members of a combination in spite of all invalidity in private law. It should be added that agreements of combination can almost without exception be so worded as to allow of withdrawal at certain terms, so that withdrawal from a combination is also possible without breach of contract.

A recognition of the inefficiency of legislation in private law has caused some legislatures of America to make a more thorough experiment in the domain of private law, and to proceed against socially harmful combinations and its members with a civil-law anathema, as it were, such as a remission of the obligation of purchasers to pay over against members of certain combinations of undertakers, the enactment of a special liability to damages, finally the general right of any individual to appeal to the courts in the manner of an *actio popularis*, in order that these may declare invalid certain combinations as contrary to public policy. These attempts also seem to lead to no satisfactory solution of the problem. Either they are a combination with the penal-law treatment, in which case the objections already stated hold true, or they are an accessory attached to invalidity at civil law, which then shares in inefficiency the fate of the principal. This is the case because such legislation as the release from obligation to pay for purchases made from combinations is unreasonable; it is not in accordance with popular standards of justice, and therefore is not enforced.

Thus experiences with mere legislation by civil or penal law lead to the conviction that the significant functions of the combinations go far beyond the domain of civil and penal law, and that therefore a solution of the problem can only be found by methods progressing beyond these limits.

III. *Administrative law.*—The next proceeding is usually designated as the administrative. The conviction which lies at the basis of the proposals herein made is that the most interesting aspect to the State in the development of combinations is the demarcation of the limit beyond which combinations become an evil to the community.

But this demarcation belongs undoubtedly to the domain of economic policy and therefore among the problems which belong, in the modern State, to the executive in the proper sense, for which reasons all the norms for the solution of these problems through the executive belong to the sphere of administrative law. To this internal reason for the competence of the State executive is added this very important consideration of expediency, that the nature of the subject requiring regulation demands an elastic apparatus, such as can only be furnished by the executive. This branch is by its nature capable to attain that which the inelastic appliances of mere invalidity in civil law and responsibility in penal law are incapable of; adaptation to all the varying demands of the complex and many-sided modern economic life, which has reached in combinations a particularly remarkable phase of development.

The recognition of these facts has in recent times led to the conviction that only administrative regulation of combinations of undertakers can lead to a satisfactory solution of the problem. Prof. Adolf Menzel particularly advocated this measure in his report made in the autumn of 1894 to the Association

<sup>a</sup> Cf. also art. 30 of the law introducing the statute of execution of May 27, 1906 (R. G. B. No. 78).

for Social Politics (Verein für Social Politik), and since that time this conception has gained many adherents. Even with this form of regulation many systems are conceivable. The idea that first suggests itself is to extend also to combinations the system of concessions introduced by law of November 26, 1852 (R. G. B. No. 253), for our industrial associations. But serious considerations may be adduced against this. There would be a danger that the combinations, which would hold a concession from the State, would envelop themselves with the mantle of State authority and that they would employ for their purposes the dignity of the State, and in this way strengthen their economic ascendancy still more. For these reasons misgivings have often been felt with reference to the system of concessions prevailing in Austria, although these concessions concerned forms of association that are more removed from the conflicts of economic life. How much more strongly would these misgivings make themselves felt if the system of concessions, and with it a portion of State authority, were applied to associations which at present represent the most highly potentiated form of the power of united capital, the most hotly disputed ground of fierce conflicts of different interests and different classes, yea, are in many cases fighting organizations directly intended for economic warfare.

Secondly, a pure registry system (Anzeigesystem), after the model of the law on associations of November 15, 1867 (R. G. B. No. 134), is conceivable. According to such a law all combinations would have to be reported to the administrative authorities, and if, after a certain term, no objection was raised they would then obtain a legal existence and would have a claim to a certification of this existence or of the absence of any objection.

While on the one hand the State executive would thus be forced into the indirect approval of the legality of combinations, it would on the other hand be without beneficially effective influence on the actions of the combinations. For the forms of a State interference (Ingerenz) provided by the above-mentioned law, the sending of an official (Commissär) and dissolution in case of the subsumption of the combination under the head of certain specified kinds of facts, without the possibility of a continuous satisfactory control from point of view of public welfare, do not at all suffice for the demands of the State over against the very peculiar and manifold forms of the combinations.

The establishment of a cartel bureau [special Government department of industrial combinations] would afford a third kind of administrative regulation, many varying forms of which have been proposed, ranging from a mere "bureau of publicity" up to a kind of bureau of concession, which, by entering and striking out combinations in a special register, would be authorized to formally pronounce their recognition by the State or withdraw it.<sup>a</sup> But the more closely the different proposals about the organization of such a bureau are scrutinized the more it becomes apparent that the organism of this bureau is of no particular significance—that rather everything depends on the character of the material norms, whose execution is intrusted to it. Naturally the question arises whether in the execution of these norms the establishment of a separate organ of the administration is necessary or whether this problem can not be just as well solved within the limits of the existing administrative organism.

If, namely, the cartel bureau is to have merely the function of registering, this can be done as well by making the registry obligatory with any public department, and in that case the name "cartel bureau," with which would be associated ordinarily the idea of a far more comprehensive governmental authority, would scarcely be appropriate. The question is entirely left out of consideration how far such a mere function of registering would at all answer the legal aims of a regulation of combinations. If the registry system is developed and if, with the obligation to report, there are connected material effects (validity, the right of legal complaint under certain circumstances, liability to punishment), then it appears that the principal significance does not lie in the institution of the cartel bureau as such, but in the regulations to be applied by the same, the interpretation of which will be different, according to their contents. Therefore every development of this bureau into a regular bureau of concessions would be repugnant from the consideration that the granting of attributes of State authority to combinations is to be avoided under all circumstances.

<sup>a</sup> Cf. the memorial of the chamber of commerce and trade at Prague, directed to the imperial royal ministry of commerce in reference to the regulation of combinations, Prague, 1896, pp. 126 ff.

Thus the conviction is established that the cartel bureau is, as it were, merely the hull, and that the real kernel is to be found in the regulations according to which the cartel bureau or another organ of the State would have to proceed. Only in one case would such a proposal obtain independent significance for the regulation of combinations, namely, if the cartel bureau were to receive the character of a governmental institution that is independent of the general administrative organism, and privileged to decide independently in matters of combinations. In this way the idea of an administrative cartel court is reached, which has lately been proposed by an eminent authority.<sup>a</sup> But this proposal also causes many misgivings. As already explained, the function of the State administration in matters of the combinations is a part of its practical economic policy, and the Government is therefore of the opinion that the solution of these questions should be transferred, according to their nature and according to all precedence in our legislation, not to a court, though it be only a forum for the settlement of administrative questions, but rather to the sphere of administration in the narrower sense of the word. And even within this sphere, divided as it is into (1) the decision of individual rights by due authority (*Instanzmässige Entscheidung*), and (2) into the so-called free administration (*freie Verwaltung*) through which the State, with unbiased judgment and to the best of its ability, cares for the interests of public weal, the second only, i. e., the free administration, will be satisfactory in dealing with combinations.

It is further inherent in the nature of a judicial decision that the same pronounces solely judgments of a declarative nature; that is, it clears up the cases in question which fall under the head of laws which were already in force before the beginning of litigation. But the decisions of the executive in matters of combinations must be of a constructive (*constitutiv*-) nature, for these decisions must grasp the varying economic conditions (*Conjuncturen*) of each industrial branch, and bring about, within these conditions, such relations as will harmonize public and private interests. Such administrative decisions, which have the force of norms of public law issued by virtue of the power to establish rules (*Verordnungsgewalt*), must not by any means be based solely on the legal and economic conditions that exist at the promoting of a combination or the formulation of any particular measure of a combination, but it must also follow the later economic development as being a very important factor. Also for this purpose a judicial decision is not well adapted, because it can not, by principle, take into consideration the changes which have later developed in the most cases.

To these considerations of principle is added the important practical consideration that the judicial procedure does not, from its character, give assurance of the necessary dispatch of decision which is necessary here where the immediate consideration of sudden development of economic life is in question. It might therefore easily happen that a judicial decision would become effective only after the favorable economic conditions had been fully exploited and when the combination, having gained its end, had been already dissolved. Even if such a proceeding should be endowed with a quasi power of injunction (*Interdictenschutz*) (the propositions as yet made have not gone so far), and if this power were carried out in the most summary fashion (for instance, after analogy of the *possessio summarissimum*), it would probably be inefficient, because it would, even then, not respond to the double requirements of a quick and at the same time exhaustive decision.

*Final results.*—As a result of these considerations the Government determined to adopt none of these systems, but rather to select another type, which unites elements of the registry and prohibitory system into one system of administrative regulation, combining therewith at the same time regulations of a penal and civil nature. This combination is the system embodied in the present bill, which provides for registration and the right of supervision and prohibition by the State, with sanctions of invalidity in civil law and prosecution in penal law.

The Government considers it an advantage of this regulation that it expresses in this form no positive approval of individual combinations, but while confining itself to a passive attitude (*Assistenz*), nevertheless remains in a position to obtain a perfect insight into the character and effects of these combinations and to protect the interests of the population and State treasury against possible abuses.

<sup>a</sup> Cf. Dr. Emil Steinbach: *Legal Transactions of Economic Organization*, Vienna, 1897, p. 183.

The proposed regulation of combinations is based on this fundamental idea. At the same time the Government feels confirmed in its belief that this law will be an efficient weapon against abuses of combinations, principally from the fact that it knows itself to be one with the incessant wishes of public opinion. If Macaulay said that a law had no eyes and no hands, and was nothing but a piece of paper as long as public opinion did not breathe the breath of life into the dead letter, then the Government can assume that this law will not lack vitality. The Government also hopes that the law will have influence by the mere fact of its existence and prevent harmful abuses of combinations in its province. For the Government wishes to prevent only these abuses, not combinations in general, and as the Government combats, in the interests of the community, the abuses of combinations, it considers itself justified, at the same time, to insure for the legitimate purposes of combinations a sufficient degree of liberty.

Moreover, on the other hand the corporation law prevents practically the abuse from stock watering and from secret or fraudulent combinations, etc.

Mr. EMERY. That is the German?

Mr. JENKS. It is the German act.

Mr. STEBBINS. Are you reading from the Industrial Commission Report?

Mr. JENKS. Yes, sir; I was just reading from Volume XVIII, page 164. I say that I myself do not approve of all that decision, but I cite that to show that the leading courts of Germany—and with them stands also the action of the imperial congress there—do believe that there may well be reasonable combinations that would be in the public interest.

The CHAIRMAN. Do they not have economic ideas, Professor, that might not appeal to us with great force?

Mr. JENKS. I should not by any means—

The CHAIRMAN. I want to see if I am correct in my recollection. When we were investigating the effect of the sugar cartel which they had in operation there, my recollection is that the German Government did what is thought to be lawful in maintaining a condition which compelled the German consumer to pay something like 2 cents a pound more for sugar than the producers of Germany were selling it to the market of the world at.

Mr. JENKS. I am not sure as to the exact amount, but it is true.

The CHAIRMAN. It was, relatively speaking, a large increase.

Mr. JENKS. That is right.

The CHAIRMAN. That is a condition which, of course, would not be tolerated in this country.

Mr. JENKS. No, sir.

The CHAIRMAN. That, of course, colors somewhat these general views contained in the paper that you have read.

Mr. JENKS. Yes, sir; they did permit in the case of that combination, through their giving a bounty on exports in part and through their purpose in part to hold the control, a price for sugar in the country at a considerably higher rate than they were regularly exporting it for.

The CHAIRMAN. Their theory would practically be that they thereby produce a larger transportation.

Mr. JENKS. In part, but in part for revenue purposes as well, I think.

The CHAIRMAN. Of course, that is a peculiar economic condition that we would not look upon with favor.

Mr. JENKS. No, sir; we would disapprove of that. The point I desire to make is simply this, that it is a generally recognized fact in the laws of that country that they do not have trusts declared to be so injurious, speaking ordinarily, as many people think we have here, but they think these combinations may often be in the public interest, although they also invariably say that a combination that is contrary to public policy and use—that is to say, unreasonable—ought to be suppressed and will be suppressed.

The CHAIRMAN. What is the fact under English legislation and under English decisions to-day with reference to over-capitalization and speculation and combination? Are you familiar with it?

Mr. JENKS. Somewhat. I had put, in 1901 I think it was, considerable time in England studying that special question, and while it is a little behind the time, I can give my impression. So far as I know, and I have attempted to follow it, there is no material change since that day. I will say this, that while they have a good many large companies in England at the present time, they have not as many, relatively speaking, as we have; that the combinations are not so compact in form, prices have not been so great as ours. I desire to answer specifically the question.

The CHAIRMAN. Stock speculation?

Mr. JENKS. Oh, yes; and so far as the watering of stock is concerned—

The CHAIRMAN. And speculation in stock?

Mr. JENKS. And speculations in that, since the adoption of this new corporation act, that gives a greater degree of publicity, there is less of that condition than with us. We know, of course, that there has been, earlier, some tremendous speculation, particularly in the South African mining shares, but speaking generally, I think that statement is well within bounds.

The CHAIRMAN. I have lately read of some local financial cataclysm of that character, but I am not familiar enough with it to know whether it is continuous.

Mr. JENKS. Of course, there is always a danger of that and would be even under this law.

The CHAIRMAN. Will you state briefly just what the salient features of publicity are that are required by the English law, without taking up too much time?

Mr. JENKS. Yes, sir; if you like I may put this into the record [indicating], just a few lines of it.

The CHAIRMAN. That would be a very good idea. In the first place, with respect to liability, there are promoters of these enterprises, and then there are special particulars as to the prospectus. The prospectus is insisted upon, and the prospectus has to go into every possible detail as to the number and amount of shares, the debentures, and the names and addresses of the parties, and any property that is taken over and put in as capital stock; also the amount payable on account of subscriptions.

**PART II.—FOREIGN LEGISLATION REGARDING CORPORATIONS AND INDUSTRIAL COMBINATIONS.**

**CHAPTER I.—INTRODUCTION.**

The forms of industrial combinations have been shown to be dependent to so great a degree upon the corporation laws of the countries in which they are formed that it has seemed best to present the leading principles of the corporation law of several countries, including some of the English colonies.

To collect material that should be trustworthy and as complete as possible, a series of questions regarding corporation laws were prepared and sent through the State Department to representatives of the United States in the several countries under consideration, requesting them either themselves to make the proper digest of the laws, by answering the questions, or to send to the Industrial Commission the laws needed for such purpose. In connection with the report from each country a note will indicate whether the digest was made in the country concerned, or whether the laws were sent from that country and the digest made under the supervision of the expert agent in the offices of the Industrial Commission.

The topics on which information was requested were as follows:

- (a) Capitalization and methods of paying in capital.
- (b) Methods of promoting and liability of promoters.
- (c) Liability of stockholders.
- (d) Duties and responsibilities of directors.
- (e) Restrictions upon directors in dealing in stocks and otherwise.
- (f) Regulations regarding prices of products.
- (g) Regulations regarding profits and dividends.
- (h) Regulations regarding ownership of stock in other corporations, or the combination of different corporations.
- (i) Reports to be made to the Government.
- (k) Reports to be made to the stockholders.
- (l) Privileges of stockholders regarding examination of books and oversight of business.
- (m) Methods of taxation of corporations.
- (n) Special methods of control by the Government.
- (o) Also special laws covering monopolies, especially those concerning the private capitalistic monopolies known as trusts.

Judging from the experience of the United States, it seemed that strict legislation, properly enforced, regarding capitalization, promotion, and the liability of directors, stockholders, and officers might possibly prevent some abuses that seemed to have arisen in the United States, or that these regulations might determine to a considerable extent the form which industrial combinations would take in the various countries. Likewise, it seemed probable that the nature of the control of the Government over such corporations, the degree of publicity insisted upon in their operations, and other regulations, might materially affect such organizations. The study of these laws and of the experience of the countries, as found in Part I of this volume, shows that there is an intimate connection between the corporation laws and the organization of industrial combinations.

Inquiry was also made regarding laws restricting monopolies, or those directed toward either the prevention or the regulation of the modern industrial combinations.

Without attempting to analyze in detail the effects of the various provisions in the laws of the different countries in these particulars, as that would involve to a considerable degree a restatement of the facts in Part I, compared, point by point, with the laws digested in Part II, it will perhaps suffice to mention briefly the following general provisions of corporation laws, in several of the countries, that seem to have been of chief influence in determining the form of industrial combinations, or in preventing abuses of great corporations in the different countries, with a word as to the nature of this influence.

The English law attempts to restrict capitalization of corporations primarily by enforcing publicity. The articles of association are to be filed with the registrar of joint stock companies, and it is also required that copies of the contracts with vendors of separate establishments uniting into a single joint stock company be filed also. All shares are held to be issued as if for cash, and owners will be held liable on that basis unless such contracts are filed.

In other countries the appraisal of properties to be bought by the corporation in exchange for stock is under such careful regulations, with due inspection by the governments, that stock watering is even more difficult.

It is of course true that where property is intangible in its nature, like patents, or where property is situated in foreign countries—as, for example, in the case of mining companies in the colonies—there is at times exploitation of the public through purely speculative means similar to those employed at times in the United States.

In practically all the foreign countries under consideration the promoter is held very strictly accountable for the representations and promises put forth in prospectuses, and the nature of the payment for his services must be so distinctly made clear to the stockholders that there is little likelihood of his making unreasonable gains. In many cases the pay of the promoter may be considered large, but it is not secret. Such delicate and difficult work often deserves large pay.

Directors of corporations in practically all European countries seem to be held considerably more strictly responsible for their operations than is usual in the United States, although in many cases the provisions of the law are not materially different.

One noteworthy factor in the laws of several countries is that instead of a small corps of officers elected by a body of directors, as in the United States, with practically all the active executive work left to one officer or a small corps of officers, we find a general executive committee, who manage the executive work as a body, and, associated with them, a supervisory body, with full powers of inspection and indirect control. The policy is one rather of executive boards than of single executives.

Much care is very generally taken to have the auditors entirely independent of the boards of directors, both as regards their appointment and pay and as regards their methods of work. The accounts also are, generally speaking, to be made public in considerably more detail than is required in the United States, the law itself frequently prescribing special methods in which the books shall be kept or special principles to be followed in preparing the balance sheet.

While the laws in most of the countries do not directly restrict directors or managers of corporations from speculating in their stocks, indirectly the responsibility of directors is such that private speculation under such circumstances seems to be very seldom found.

Generally speaking, especially in the German countries, the Government requires very detailed reports to be made regarding the condition of business, partly, evidently, for the sake of keeping the stockholders and the public informed regarding the nature of the business of the corporations, but also for the purpose of taxation. In some of the countries the rate of taxation on corporations is high and is in the nature of an income tax, so that it becomes necessary that the Government be informed regarding even the details of the business.

Generally speaking, the European countries have no laws regarding monopolies that are especially restrictive, with the possible exception of France; but the rigidity of the corporation laws render several of the abuses which seem common in the United States almost impossible, and the liberality of the governments in promoting agreements regarding output and prices has perhaps prevented the combinations from taking so unified a form that the governments would feel called upon to impose any special restrictions. As has been explained in Part I, laws giving somewhat more careful supervision of the affairs of industrial combinations in the future are under contemplation in some of the States.

#### CHAPTER II.—ENGLAND.<sup>a</sup>

##### A.—Capitalization and methods of paying in capital.

SECTION 1. *Business may begin before capital has been paid.*—A company may commence business before the whole amount of its capital has been subscribed.

SEC. 2. *Reduction of capital.*—A company may by resolution reduce its capital, "but no such resolution for reducing the capital of any company shall come into operation until an order of the court is registered by the registrar of joint stock companies."<sup>b</sup>

<sup>a</sup> The digests of the corporation laws of England and the English colonies were made by Herbert A. Heminway.

<sup>b</sup> See sec. 64 post (Companies act, 1867, sec. 9).

SEC. 3. *Increase of capital.*—The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company in general meeting directs, or, if no direction is given, as the directors think expedient.<sup>a</sup>

SEC. 4. *Manner in which shares are to be issued and held.*—Every share shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies<sup>b</sup> at or before the issue of such shares.<sup>c</sup>

**B.—Methods of promoting and liability of promoters.**

SEC. 5. *List of directors to be presented at time of registration.*<sup>1</sup>—On the application for registration of the memorandum and articles of association of a company the applicant shall deliver to the registrar a list of the persons who have consented to be directors of the company, and if this list contains the name of any person who has not so consented the applicant shall be liable to a fine not exceeding £50.<sup>d</sup>

SEC. 6. *Special requirements as to particulars of prospectus.*—Every prospectus issued by or on behalf of a company, or any person engaged or interested in the formation of the company, must state (a) the contents of the memorandum of association, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them, respectively; and the number of founder's or management shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and (b) the number of shares, if any, fixed by the articles of association as to the qualification of a director, and any provisions in the articles of association as to the remuneration of directors; and (c) the names, descriptions, and addresses of the directors or proposed directors; and (d) the minimum subscription on which the directors may proceed to allotment and the amount payable on application and allotment on each share, and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment, and the amount actually allotted, and the amount, if any, actually paid on such shares; and (e) the number and amount of shares and debentures issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which such shares or debentures have been issued or are proposed or intended to be issued; and (f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed to be so acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of publication of the prospectus, and the amount payable in cash, shares, or debentures to the vendor, and where there is more than one separate vendor, or the company is a subpurchaser, the amount so payable to each vendor; and (g) the amount, if any, paid or payable as purchase money in cash, shares, or debentures of any such property as aforesaid, specifying the amount payable for good will; and (h) the amount paid or payable as commission for subscribing or procuring or agreeing to procure subscriptions for any shares in the company, or the rate of any such commission; and (i) the amount or estimated amount of preliminary expenses; and (j) the amount paid or intended to be paid to any promoter and the consideration for any such payment; and (k) the dates and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected, provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or to any contract entered into more than 3 years before the date of publication of the prospectus; and (l) the names and addresses of the auditors, if any, of the company; and (m) full particulars of the nature and extent of the interest, if any, of every director in the promotion of or in the property proposed to be acquired by the company, with a statement

<sup>a</sup> See secs. 41 and 43 post (Companies act, 1862, Table A, art. 26).

<sup>b</sup> See sec. 64 post.

<sup>c</sup> Companies act, 1867, sec. 25.

<sup>d</sup> Companies act, 1900, sec. 2, subd. 2.



of all sums paid or agreed to be paid to him in cash or shares by any person either to qualify him as a director or otherwise for services rendered by him in connection with the formation of the company. In this section the term "vendor" includes lessor, and "purchase money" includes rent. Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specially referred to in the prospectus, shall be void.<sup>a</sup>

**SEC. 7. Statutory meeting.**—Every company limited by shares and registered after "January 1, 1901," shall within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the company, which shall be called the statutory meeting.<sup>b</sup>

**SEC. 8. Promoters must make good their representations.**—Where promoters issued a circular stating that £7,000 had been subscribed for, but in fact that amount had not been subscribed for, in proceedings to wind up the company, the promoters were compelled to make this statement good by contributing as if they owned the amount of stock necessary to bring the amount subscribed up to the £7,000.<sup>c</sup>

**SEC. 9. When promoters are liable for acts of each other.**—Promoters are not agents of each other, and are not liable for the acts of each other further than they have agreed to the transaction.<sup>d</sup>

**SEC. 10. Contracts of promoters.**—Promoters are personally liable on contracts made by them in behalf of the unformed corporation.<sup>e</sup> But a certificate of incorporation given by the registrar is conclusive evidence that the company is duly formed.<sup>f</sup>

#### C.—Liability of stockholders.

**SEC. 11. Liability of present and past members of company.**—In the event of a company formed under this act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories among themselves, with the qualifications following; that is to say—

(1) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upward prior to the commencement of the winding up.

(2) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.

(3) No past member shall be liable to contribute to the assets of the company unless it appear to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this act.

(4) In the case of a company limited by shares<sup>g</sup> no contribution in case of dissolution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect to which he is liable as a present or past member.

(5) In the case of a company limited by guaranty<sup>h</sup> no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association.

(6) Nothing in this act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract.

<sup>a</sup> Companies act, 1900, sec. 10.

<sup>b</sup> See sec. 46 post (Companies act, 1900, sec. 12).

<sup>c</sup> In re Royal Victoria Palace Theater Syndicate, 18 L. R. Equity, 661.

<sup>d</sup> Reynell v. Lewis, 15 M. and W., 517.

<sup>e</sup> Kelner v. Baxter et al., L. R., 2 C. P., 174. See post, sec. 16.

<sup>f</sup> Companies act, 1900, sec. 1.

<sup>g</sup> See post, sec. 39, subd. III.

<sup>h</sup> See post, sec. 39, subd. III.

(7) No sum due any member, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken in to account, for the purposes of the final adjustment of the rights of the contributors amongst themselves.<sup>a</sup>

SEC. 12. If any company under this act carries on business when the number of its members is less than 7 for a period of six months after the number has been so reduced, every person who is a member of such a company during the time that it so carries on business after such a period of six months, and is cognizant of the fact that it is so carrying on business with fewer than 7 members, shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member.<sup>b</sup>

*D.—Duties and responsibilities of directors.*

SEC. 13. *Qualification of directors.*—A director is given two months after his appointment to obtain the required stock for a director to own. If he does not within such time get and retain such stock, his office becomes vacated and he is liable to pay the company for every day he acts as director after this.<sup>c</sup>

SEC. 14. *Liability for statements in prospectus or notice.*<sup>1</sup>—(1) Where, after the passage of this act, a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice and every person who having authorized such naming of him is named in the prospectus or notice as a director of the company, or as having agreed to become a director of the company either immediately or after an interval of time, and every promoter of the company and every person who has authorized the issue of the prospectus or notice shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(a) *First exception.*—With respect to every such untrue statement not purporting to be made upon the authority of an expert or of a public official document or statement that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be, believe that the statement was true; and

(b) *Second exception.*—With respect to every such untrue statement purporting to be a statement by or contained in what purports to be true copy of or extract from a report or valuation of an engineer, valuer, accountant, or other expert, that it fairly represented the statement made by such engineer, valuer, accountant, or other expert, or was a correct and fair copy of or extract from the report or valuation: *Provided always*, That notwithstanding that such untrue statement fairly represented the statement made by such engineer, valuer, accountant, or other expert, or was a correct and fair copy of an extract from the report or valuation, such director, person named, promoter, or other person who authorized the issue of the prospectus or notice as aforesaid shall be liable to pay compensation as aforesaid if it be proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and

(c) *Third exception.*—With respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of such statement or copy of or extract from such document, or unless it is proved that having consented to become a director of a company he withdraw his consent before the issue of the prospectus or notice, and that the prospectus or notice was issued without his authority or consent, or that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent, or that after

<sup>a</sup> Companies act, 1862, sec. 38.

<sup>b</sup> Companies act, 1862, sec. 48. See post, secs. 21, 22.

<sup>c</sup> Companies act, 1900, sec. 3.

the issue of such prospectus or notice and before allotment thereunder, he, on becoming aware of any untrue statement, withdrew his consent thereto, and caused reasonable public notice of such withdrawal and of the reason therefor to be given.

*"Promoter," how used.*—(2) A promoter in this section means a promoter who was a party to the preparation of the prospectus or notice, or of the portion thereof containing such untrue statement, but shall not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company.

*Existing companies obtaining new capital.*—(3) Where any company existing at the passing of this act, which has issued shares or debentures, shall be desirous of obtaining further capital by subscriptions for shares or debentures, and for that purpose shall issue a prospectus or notice, no director of such company shall be liable in respect to any statement therein unless he shall have authorized the issue of such prospectus or notice, or have adopted or ratified the same.

*Experts.*—(4) In this section the word "expert" includes any person whose profession gives authority to a statement made by him."<sup>a</sup>

SEC. 15. *Fraud of directors a misdemeanor.*—Directors fraudulently appropriating property or keeping fraudulent accounts, or willfully destroying books, or publishing fraudulent statements are guilty of a misdemeanor.<sup>b</sup>

SEC. 16. *Power of court to assess damages against delinquent directors, officers, and promoters.*—Where in the course of the winding up of a company under the companies acts it appears that any person who has taken part in the formation of the company, or any past or present director, manager, liquidator, or other officer of the company has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such date as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retained, misfeasance, or breach of trust as the court thinks just.<sup>c</sup>

SEC. 17. *Accounts.*—The directors must cause true accounts to be kept.<sup>d</sup>

SEC. 18. *Company may have directors with unlimited liability.*—Where, after the commencement of this act, a company is formed "under the companies act, 1862," the liability of the directors or managers of such company, or the managing director, may, if so provided by the memorandum of association, be unlimited.<sup>e</sup>

SEC. 19. Directors must yearly furnish each member a balance sheet showing the condition of the company.<sup>f</sup>

SEC. 20.—*Ultra vires application of funds.*—If the directors of a corporation use the funds of the corporation in ultra vires transactions they are personally liable for such funds.<sup>g</sup>

SEC. 21. Where any order is made for winding up a company by the court, or subject to the supervision of the court, if it appear in the course of such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offense in relation to the company for which he is criminally responsible, the court may, on the application of any person interested in such winding up, or of its own motion, direct the official liquidators \* \* \* to institute and conduct a prosecution or prosecutions for such offense, and may order the costs and expenses to be paid out of the assets of the company.<sup>h</sup>

<sup>a</sup> The directors' liability act, 1890, sec. 3.

<sup>b</sup> 24 and 25 Vict., ch. 96, secs. 81–84, and companies act, 1862, sec. 166.

<sup>c</sup> Companies winding-up act, 1890, sec. 10.

<sup>d</sup> See post, secs. 41 and 43. Companies act, 1862, Sch. I, Table A, art 78.

<sup>e</sup> Companies act, 1867, sec. 4.

<sup>f</sup> See post, secs. 41, 43, and companies act, 1862, Sch. I, Table A, arts. 79–82.

<sup>g</sup> Cullerne v. London, etc., Society, 252 B. D., 485; London Financial Association v. Kelk, 26 Ch. Div., 107.

<sup>h</sup> Companies act, 1862, sec. 167.

SEC. 22. Where a company is being wound up altogether, voluntarily, if it appears to the liquidators conducting such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offense in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction, to prosecute such offender, and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company in priority to all other liabilities.<sup>a</sup>

*E.—Restrictions upon directors in dealing in stocks and otherwise.*

SEC. 23. *Director may deal in shares.*—Same man director of rival companies.—In dealing with his shares a director is, in general, as free as any other shareholder.<sup>b</sup> A director can not be retained from acting as director of a rival company.<sup>c</sup>

SEC. 24. *Disqualification of directors.*—The office of director shall be vacated—

If he holds any other office or place of profit under the company;

If he becomes bankrupt or insolvent;

If he is concerned in or participates in the profits of any contract with the company.

*Exception.*—But the above rules shall be subjected to the following exception: That no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is a director, nevertheless he shall not vote in respect of such contract or work; and if he does so vote his vote shall not be counted. This applies to companies limited by shares and may be changed by the articles of association or an amendment thereto.<sup>d</sup>

SEC. 25. *Contracts in which directors are interested may be confirmed.*—Shareholders can, by a resolution of a general meeting, duly convened, confirm a contract in which the directors or some of them are interested.<sup>e</sup>

*F.—Regulations regarding prices of products.*

The only regulations made are found in the antitrust law under Topic O.

*G.—Regulations regarding profits and dividends.*

SEC. 26. *Rules as to dividends.*—The following provisions may be changed by the articles of association on a special resolution, but in the absence of such change apply to all companies limited by shares:<sup>f</sup>

1. The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares.

2. No dividend shall be payable except out of the profits arising from the business of the company.

3. The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.

4. The directors may, before recommending any dividend, set aside out of the profits a proper sum to meet contingencies or for equalizing dividends.

5. No dividend shall bear interest as against the company.

6. When any dividend has been declared notice must be given each shareholder, and all dividends remaining unclaimed for three years may be forfeited to the company.

SEC. 27. *Profits governed by amount paid on shares.*—By the company's regulations or special resolutions dividends may be paid in proportion to the amount paid up on each share, in cases where a larger amount is paid up on some shares than on others.<sup>g</sup>

<sup>a</sup> The companies act, 1862, sec. 168. See ante, sec. 5, and post, secs. 34, 36, 55, 56, 59, 67, 69.

<sup>b</sup> Gilbert's case, 5 Ch., 559; South London Fishmarket Co., 39 Ch. Div., 324; Cawley & Co., 42 Ch. Div., 209.

<sup>c</sup> London and Mashonaland Co. v. New Mashonaland Co., 1891, W. N., 169.

<sup>d</sup> Companies act, 1862, Table A, art. 57.

<sup>e</sup> Grant v. United Switchback Co., 40 C. D., 135.

<sup>f</sup> Companies act, 1862, secs. 72-77.

<sup>g</sup> Companies act, 1867, sec. 24, subd. 3.

**H.—Regulations regarding ownership of stock in other corporations, or the combination of different companies.**

Sec. 28. *Can not own stock of another company.*—Where a company is incorporated by act of Parliament, and is not by its act of incorporation given power to hold stock in another corporation, the purchase of such stock is ultra vires, and the public, by the attorney-general, can interpose and prevent it.<sup>a</sup> Where the constitution of a corporation authorizes it to hold stock in another corporation it may do so.<sup>b</sup>

**I.—Reports to be made to the Government.**

Sec. 29. *Prospectus filed with registrar.*—A copy of every prospectus shall be filed with the registrar on or before the date of its publication.<sup>c</sup>

Sec. 30. *Return as to allotment.*—Whenever a company limited by shares makes any allotment of its shares, the company shall within one month thereafter file with the registrar (a) a return of the allotments stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount, if any, paid or due and payable on each share; and (b) in case of shares allotted in whole or in part for a consideration other than cash, a contract in writing constituting the title of the allottee to such allotment, together with any contract of sale, or for services or other consideration in respect to which such allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are so treated as paid up, and the consideration for which they have been allotted.<sup>d</sup>

Sec. 31. *Report preceding statutory meeting to be filed.*—The directors shall cause a copy of the report<sup>e</sup> preceding the statutory meeting<sup>f</sup> to be filed with the registrar forthwith after the sending thereof to the members of the company.<sup>g</sup>

Sec. 32. *Annual report.*—Every company under this act, and having a capital divided into shares, shall make, at least once in every year, a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars:

*What report must contain.*—(1) The amount of the capital of the company and the number of shares into which it is divided.

(2) The number of shares taken from the commencement of the company up to the date of the summary; distinguishing between the shares issued for cash and the shares issued otherwise than for cash or only partly for cash.

(3) The amount of calls made on each share.

(4) The total amount of calls received.

(5) The total amount of calls unpaid.

(6) The total amount of shares forfeited.

(7) The total amount of debt due from the company in respect of all mortgages and charges which require registration.

(8) The names and addresses of the persons who are the directors of the company at the date of the summary.

(9) The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them. The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such four-

<sup>a</sup> Great Eastern Railway Co. v. Turner & L. R., Ch. App., 149; Attorney-General v. Great Northern Railway Co., 1 Dr. & Sm., 15.

<sup>b</sup> See post, sec. 39; ex parte Contract Corp., 3 Ch., 105; Royal Bank of India case, 4 Ch., 252.

<sup>c</sup> Companies act, 1900, sec. 9.

<sup>d</sup> Companies act, 1900, sec. 7.

<sup>e</sup> See post, sec. 46.

<sup>f</sup> See ante, sec. 7.

<sup>g</sup> Companies act, 1900, sec. 12, subd. 4.

teenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint stock companies.<sup>a</sup>

**Sec. 33. *Penalty for false statement.***—If any person in any return, report, certificate, balance sheet, or other document required by or for the purposes of this act willfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment for a term not exceeding two years with or without hard labor.<sup>b</sup>

**Sec. 34. *Failure to make report, penalty, liability of officers.***—If any company under this act, and having a capital divided into shares, makes default in complying with the provisions of this act with respect to forwarding such list of members or summary as hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding £5 for every day during which such default continues, and every director and manager of the company who shall knowingly and willfully authorize or permit such default shall incur the like penalty.<sup>c</sup>

**Sec. 35. *Notice to be given of changes.***—Every company under this act, having a capital divided into shares, that has consolidated and divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock, shall give notice to the registrar of joint stock companies of such consolidation, division, or conversion, specifying the shares so consolidated, divided, or converted.<sup>d</sup>

**Sec. 36. *Notice of increase of capital or members to be given to registrar.***—Where a company has a capital divided into shares, whether such shares may or may not have been converted into stock, notice of any increase in such capital beyond the registered capital, and where a company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number shall be given to the registrar, in the case of an increase of capital, within fifteen days from the date of the passing of the resolution by which such increase has been authorized, and in the case of an increase of members within fifteen days from the time at which such increase of members has been resolved on or has taken place, and the registrar shall forthwith record the amount of such increase of capital or members.

***Penalty.***—If such notice is not given within the period aforesaid, the company in default shall incur a penalty not exceeding £5 for every day during which such neglect to give notice continues, and every director and manager of the company who shall knowingly and willfully authorize or permit such default shall incur the like penalty.<sup>e</sup>

**Sec. 37. *Registered office of company.***—Every company under this act shall have a registered office to which all communications and notices may be addressed. If any company under this act carries on business without having such an office, it shall incur a penalty not exceeding £5 for every day during which business is so carried on.

**Sec. 38. *Notice of place of office.***—Notice of the situation of such registered office, and of any change therein, shall be given to the registrar and recorded by him. Until such notice is given the company shall not be deemed to have complied with the provisions of this act with respect to having a registered office.<sup>f</sup>

**Sec. 39. *The memorandum of the company is absolutely binding on it.*** This must be filed with the registrar of companies, and must contain:

1. ***Memorandum of an unlimited company.***—Where a company is formed on the principle of having no limit placed on the liability of its members, called an unlimited company, the memorandum of association must contain the following things:

- (1) The name of the proposed company.
- (2) The part of the United Kingdom in which the registered office of the company is proposed to be situate.
- (3) The objects for which the proposed company is to be established.

<sup>a</sup> Companies act, 1862, sec. 26, as amended by companies act, 1900, sec. 20. See post, sec. 64.

<sup>b</sup> Companies act, 1900, sec. 23.

<sup>c</sup> Companies act, 1862, sec. 27.

<sup>d</sup> Companies act, 1862, sec. 28.

<sup>e</sup> Companies act, 1862, sec. 34.

<sup>f</sup> Companies act, 1862, secs. 39 and 40.

II. *Memorandum of association of a company limited by guaranty.*—Where the company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, called a company limited by guaranty, the memorandum of association shall contain the following things:

(1) The name of the proposed company, with the addition of the word "Limited" as the last word in such name.

(2) The part of the United Kingdom in which the registered office of the company is proposed to be situate.

(3) The objects for which the proposed company is to be established.

(4) A declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up during the time he is a member, or within one year afterwards, for the payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified sum.

III. *Memorandum of association of a company limited by shares.*—Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, called a company limited by shares, the memorandum of association shall contain the following things:

(1) The name of the proposed company, with the addition of the word "Limited" as the last word of such name.

(2) The part of the United Kingdom in which the registered office of the company is proposed to be situate.

(3) The objects for which the proposed company is to be established.

(4) A declaration that the liability of the members is limited.

(5) The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount.

Subject to the following regulations:

(1) That no subscriber shall take less than one share.

(2) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.<sup>a</sup>

By special resolution and ratification by the court, the memorandum of association may be altered.<sup>b</sup>

SEC. 40. *Articles of association to be registered.*—The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guaranty or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient. The articles shall be expressed in separate paragraphs, numbered arithmetically. They may adopt all or any of the provisions contained in the table marked "A" in the first schedule hereto. They shall, in the case of a company, whether limited by guaranty or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered, and in the case of a company, whether limited by guaranty or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration. In a company limited by guaranty or unlimited, and having a capital divided into shares, each subscriber shall take one share at least, and shall write opposite his name in the memorandum of association the number of shares he takes.

SEC. 41. In the case of a company limited by shares the regulations contained in Table A of the first schedule shall be deemed, the regulations of the company except when expressly stated otherwise in the articles of association.

SEC. 42. The articles of association must be filed with the registrar of joint stock companies.<sup>c</sup>

SEC. 43. The regulations of the company above mentioned may be changed at a regular meeting of the company.<sup>d</sup>

<sup>a</sup> Companies act, 1862, secs. 8, 9, and 10.

<sup>b</sup> 53 and 54 Vict. c. 62.

<sup>c</sup> Companies act, 1862, secs. 14, 15, and 17.

<sup>d</sup> Companies act, 1862, sec. 50.

SEC. 44. *Registry of special resolutions.*—All special resolutions must be printed and forwarded to the registrar of joint stock companies within fifteen days after they are passed. A penalty not exceeding £5 is imposed upon both company and officers for each day's delay after that time.<sup>a</sup>

SEC. 45. *Registration of mortgages and charges.*—Every mortgage or charge created by a company after "January 1, 1901," and being either (a) a mortgage or charge for the purpose of securing any issue of debentures; or (b) a mortgage or charge on uncalled capital of the company; or (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (d) a floating charge on the undertaking or property of the company shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless filed with the registrar within twenty-one days after its creation.<sup>b</sup>

K.—*Reports to be made to the stockholders.*

SEC. 46. *Report preceding statutory meeting.*—The directors shall, at least seven days before the day on which the "statutory" meeting<sup>c</sup> is held, forward to every member of the company a report certified by not less than two directors of the company; and (e) the particulars of any contract, the modification of and manager, stating (a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up or otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted; (b) the total amount of cash received by the company in respect of such shares distinguished as aforesaid; (c) an abstract of the receipts and payments of the company on capital account to the date of the report, and an account or estimate of the preliminary expenses of the company; (d) the names, addresses, and descriptions of the directors, auditors (if any), manager (if any), and secretary of the company; and (e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification.<sup>d</sup>

SEC. 47. *Annual statement to the general meeting.*—Once at least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters; every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

SEC. 48. *Balance sheet.*—A balance sheet shall be made out in every year and laid before the company in general meeting and such balance sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

SEC. 49. *Balance sheet served on members.*—A printed copy of such balance sheet shall, seven days previous to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served. This may be changed.<sup>e</sup>

SEC. 50. *Reports to be credited.*—Every auditor of a company (who shall be neither a director nor an officer of the company) shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such informa-

<sup>a</sup> Companies act, 1862, sec. 53. See ante, sec. 2.

<sup>b</sup> Companies act, 1900, sec. 14.

<sup>c</sup> See ante, sec. 7.

<sup>d</sup> Companies act, 1900, sec. 12.

<sup>e</sup> See ante, secs. 41 and 43; companies act, 1862, Sch. I, Table A, arts. 79-82.



tion and explanation as may be necessary for the performance of the duties of the auditors, and the auditors shall sign a certificate at the foot of the balance sheet stating whether or not all their requirements as auditors have been complied with, and shall make a report to the shareholders on the accounts examined by them and on every balance sheet laid before the company in general meeting during their tenure of office; and in every such report shall state whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs as shown by the books of the company, and such report shall be read before the company in general meeting.<sup>a</sup>

**Sec. 51. Copies of memorandum and resolutions for members.**—The company must supply to members on demand printed copies of its memorandum and articles, and of any special resolutions; and for failure to do so the company shall incur a penalty not to exceed £1 for each offense.<sup>b</sup>

**Sec. 52. Notice of meeting to be given to members.**—In the case of companies limited by shares, at least seven days' notice of a general meeting must be given members. This notice must specify the place, the day, and the hour of meeting, and in case of special business the general nature of that business. This rule can be changed by the articles of association or an amendment thereon.<sup>c</sup>

**L.—Privileges of stockholders regarding examination of books and oversight of business.**

**Sec. 53. Accounts to be kept.**—The directors shall cause true accounts to be kept—

Of the stock in trade of the company;

Of the sums of money received and expended by the company, and the matter in respect of which such receipt and expenditure took place; and,

Of the credits and liabilities of the company.

**Sec. 54. Right of stockholder to inspect accounts.**—The books of account shall be kept at the registered office of the company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection of the members during the hours of business.<sup>d</sup> Above applies only to companies limited by shares and may be changed by the articles of association.<sup>e</sup>

**Sec. 55. Register of members.**—Every company under this act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars:

(1) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number, and the amount paid or agreed to be considered as paid on the shares of each member.

(2) The date at which the name of any person was entered in the register as a member.

(3) The date at which any person ceased to be a member.

And any company acting in contravention of this section shall incur a penalty not exceeding £5 for every day during which its default with complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and willfully authorize or permit such contravention of this section shall incur a penalty not exceeding £5 for every day during which its default with complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and willfully authorize or permit such contravention shall incur like penalty.<sup>f</sup>

**Sec. 56. Register of members to be kept at registered office and to be open to inspection by members.**—The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned. Except when closed as hereinafter mentioned,<sup>g</sup> it shall, during business hours, but subject to such restrictions as the company

<sup>a</sup> Companies act, 1900, sec. 23.

<sup>b</sup> Companies act, 1862, secs. 19 and 54.

<sup>c</sup> See ante, secs. 41 and 43; the companies act, 1862, Sch. I, Table A, art. 35.

<sup>d</sup> Companies act, 1862, Sch. I, Table A, art. 78.

<sup>e</sup> See ante, secs. 41 and 43.

<sup>f</sup> Companies act, 1862, sec. 25.

<sup>g</sup> See sec. 57.

in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of 1 shilling, or such less sum as the company may prescribe for each inspection, and every such member or other person may require a copy of such register or any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of 6 pence for every 100 words required to be copied: if such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding £2, and a further penalty not exceeding £2 for every day during which such refusal continues, and every director and manager of the company who shall knowingly authorize or permit such refusal shall incur the like penalty; and in addition to the above penalty as respects companies registered in England and Ireland, any judge sitting in chambers, or the vice-warden of the stannaries, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register.<sup>a</sup>

Sec. 57. *Books may be closed thirty days each year.*—Any company under this act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, close the register of members for any time or times not exceeding in the whole thirty days in each year.<sup>b</sup>

Sec. 58. *Remedy for improper entry or omission in register.*—If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in England and Ireland, by motion in any of Her Majesty's superior courts of law or equity or by an application to a judge sitting in chambers, or to the vice-warden of the stannaries in the case of companies subject to his jurisdiction apply for an order of the court that the register may be rectified, and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied with the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members, or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register.<sup>c</sup>

Sec. 59. *Register of mortgages to be kept.*—Every limited company under this act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect to each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. If any part of the property is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer who knowingly and willfully authorizes or permits the omission of such entry shall incur a penalty not exceeding £50. The said register of mortgages shall be open to inspection by any creditor or member of the company at all reasonable times, and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorizing or knowingly and willfully permitting such refusal, shall incur a penalty not exceeding £5, and a further penalty not exceeding £2 for every day during which such refusal continues, and in addition to the above penalty the court may by order compel an immediate inspection of the register.<sup>d</sup>

Sec. 60. *Extraordinary general meeting.*—Notwithstanding anything in any regulations of a company, the directors of a company shall, on the requisition

<sup>a</sup> Companies act, 1862, sec. 32.

<sup>b</sup> Companies act, 1862, sec. 33.

<sup>c</sup> Companies act, 1862, sec. 35.

<sup>d</sup> Companies act, 1862, sec. 43.

of the holders of not less than one-tenth of the issued capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.<sup>a</sup>

*M.—Methods of taxation of corporations.*

SEC. 61. *Stamps.*—Articles of association, contracts for sale of shares, letters of allotment, mortgages of shares, proxy papers, scrip certificates, transfers of shares, insurance policies, and other papers used by corporations must be stamped.

SEC. 62. *Income tax.*—The treasurer of a company must make out a list of the income of the company, and deliver it to the assessor of taxes, and the income as thus ascertained is taxed.<sup>b</sup>

*N.—Special methods of control by the Government.*

SEC. 63. *Board of trade.*—The board of trade in England is one of the administrative departments of government, being a committee of the privy council which is appointed for the consideration of matters relating to trade. The president of the board of trade, its real executive officer, is a member of the cabinet, with an official salary of £2,000. The rules made by this board within the scope of its authority have the force of law.

SEC. 64. *Registrars appointed.*—The board of trade may from time to time appoint such registrars and clerks as they may think necessary for the registration of companies. The board of trade may make such regulations as they think fit with respect to the duties to be performed by such registrars aforesaid.

*Public may inspect records of registrar.*—Every person may inspect the documents kept by the registrar of joint-stock companies, upon the payment of a fee to be fixed by the board of trade. Numerous certificates and reports must be filed by each company with the registrar of companies.<sup>c</sup>

SEC. 65. *Examination of affairs of company by inspectors.*—The board of trade may appoint one or more competent inspectors to examine into the affairs of any company under this act, and to report thereon, in such manner as the board may direct, upon the applications following:

(1) *Banking company with capital divided into shares.*—In case of a banking company that has a capital divided into shares, upon the application of members holding not less than one-third part of the whole shares of the company for the time being issued;

(2) *Other than banking companies have capital divided into shares.*—In the case of any other than a banking company that has a capital divided into shares, upon the application of members holding not less than one-fifth part of the whole shares of the company for the time being issued.

(3) *Company not having its capital divided into shares.*—In the case of any company not having a capital divided into shares, and upon the application of members being in number not less than one-fifth of the whole number of persons for the time being entered on the register of the company as members.

SEC. 66. *Application to be supported by evidence—Board may require applicants to give security.*—The application shall be supported by such evidence as the board of trade may require for the purpose of showing that the applicants have good reason for requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same; the board of trade may also require the applicants to give security for the payment of the costs of the inquiry before appointing any inspector or inspectors.

SEC. 67. *Inspection of books—Officers examine under oath.*—It shall be the duty of all officers or agents of the company to produce for the examination of the inspectors all books and documents in their custody or power. Any inspector may examine upon oath the officers and agents of the company in relation to its business and may administer such oath accordingly. If any officer or agent refuses to produce any book or document hereinby directed to be produced, or to answer any question relating to the affairs of the company, he shall incur a penalty not exceeding £5 in respect of each offense.

<sup>a</sup> Companies act, 1900, sec. 13.

<sup>b</sup> 5 and 6 Vic., ch. 35, secs. 40, 44 and 54, and 42–43 Vic., ch. 21, sec. 18.

<sup>c</sup> Companies act, 1862, sec. 174. See ante, secs. 2, 32, 34, 35, 36, 38–40, 42, 44, and post, secs. 70 and 77.

**Sec. 68. Result of examination made known to board and members of company.**—Upon the conclusion of the examination the inspectors shall report their opinion to the board of trade. A copy shall be forwarded by the board of trade to the registered office of the company, and a further report shall, upon the request of the members upon whose application the inspection was made, be delivered to them or to any one or more of them.<sup>a</sup>

**Sec. 69. Statements by insurance and other companies.**—Every limited banking company and every insurance company and deposit, provident, or benefit society under this act shall, before it commences business and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the following form:

**Form of statement.**—The capital of the company is divided into — shares of — each. The number of shares issued is —. Calls to the amount of — pounds per share have been made, under which the sum of — pounds has been received.

The liabilities of the company on the 1st day of January (or July) were:

Debts owing to sundry persons by the company—

On judgment, —.  
On specialties, —.  
On notes or bills, —.  
On simple contracts, —.  
On estimated liabilities, —.

The assets of the company on that day were—

Government securities (stating them), —.  
Bills of exchange and promissory notes, —.  
Cash at the bankers, —.  
Other securities, —.

Or as near thereto as circumstances will admit, and a copy of such statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on, and if default is made in compliance with the provisions of this section, the company shall be liable to a penalty not exceeding £5 for every day during which such default continues, and every director and manager of the company who shall knowingly and willfully authorize or permit such default shall incur the like penalty.

Every member and every creditor of any company mentioned in this section shall be entitled to a copy of the above-mentioned statement on payment of a sum not exceeding 6 pence.<sup>b</sup>

**Sec. 70. Register of directors and managers.**—Every company under this act and not having a capital divided into shares shall keep at its registered office a register containing the names and addresses and occupations of its directors or managers, and shall send to the registrar of joint-stock companies a copy of such register, and shall from time to time notify the registrar of any change that takes place in such directors or managers.

**Sec. 71.** For violation of the above provision a penalty is imposed of not more than £5 for each day, and each director or manager is liable for the same.<sup>c</sup>

#### O.—Special laws regarding monopolies.

**Sec. 72. Amalgamation of insurance companies.**—When it is intended to amalgamate two or more (life insurance) companies, or to transfer the life assurance business of one company to another, the directors of any one or more of such companies may apply to the court, by petition, to sanction the proposed arrangement, notice of such application being published in the Gazette, and the court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may confirm the same if it is satisfied that no sufficient objection to the arrangement has been established.

**Sec. 73. Notice to policy holders—Contract open to inspection.**—Before any such application is made to the court a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which such amalgamation or transfer is proposed to be effected and copies of the actuarial or other reports upon which such agreement or deed is founded shall be forwarded to

<sup>a</sup> Companies act, 1862, secs. 56 to 59.

<sup>b</sup> Companies act, 1862, sec. 44.

<sup>c</sup> Companies act, 1862, secs. 45 and 46 as amended by companies act, 1900.

each policy holder of each company in case of amalgamation or to each policy holder of the transferred company in case of transfer; and the agreement or deed under which such amalgamation or transfer is effected shall be open for the inspection of the policy holders and shareholders at the office or offices of the company or companies for a period of fifteen days after the issuing of the abstract herein provided.

SEC. 74. *When court will not sanction arrangement.*—The court shall not sanction any amalgamation or transfer in any case in which it appears to the court that policy holders representing one-tenth or more of the total amount assured in any company which is proposed to amalgamate or in any company the business of which it is proposed to transfer dissent from such amalgamation or transfer.

SEC. 75. *Sanction of court necessary.*—No company shall amalgamate with another or transfer its business to another unless such amalgamation or transfer is confirmed by the court in accordance with this section: *Provided, always,* That this section shall not apply in any case in which the business of any company which is sought to be amalgamated or transferred does not comprise the business of life assurance.<sup>a</sup>

SEC. 76. *Report of assets and liabilities to board of trade.*—When an amalgamation takes place between any companies, or when the business of one company is transferred to another company, the combined company or purchasing company, as the case may be, shall, within ten days from the date of the completion of the amalgamation or transfer, deposit with the board of trade certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature and terms of the amalgamation or transfer, and a certified copy of the agreement or deed under which such amalgamation or transfer is effected, and certified copies of the actuarial or other reports upon which such agreement or deed is founded, and the statement or agreement or deed of amalgamation or transfer shall be accompanied by a declaration under the hand of the chairman of each company and the principal managing officer of each company that to the best of their belief every payment made or to be made to any person whatsoever on account of the said amalgamation or transfer is therein fully set forth, and that no other payment beyond those set forth have been made, or are to be made, either in money, policies, bonds, valuable securities, or other property by or with the knowledge of any parties to the said amalgamation or transfer.<sup>b</sup>

SEC. 77. *Documents kept by registrar and open to inspection.*—The board of trade may direct any printed or other document required by this act, or certified copies thereof, to be kept by the registrar of joint stock companies or other officer of the board of trade, and any person may, on payment of such fees as the board of trade may direct, inspect the same at his office and procure copies thereof.<sup>c</sup>

SEC. 78. *Penalty for default.*—Every company which makes default in complying with the requirements of this act shall be liable to a penalty not exceeding £50 for every day during which the default continues; and if default continues during a period of three months after notice of default by the board of trade, which notice shall be published in one or more newspapers as the board of trade may direct, and after such publication the court may order the winding up of the company upon the application of one or more policy holders or shareholders.<sup>d</sup>

SEC. 79. *Parliament to have abstract of reports.*—The board of trade shall lay annually before Parliament the statements and abstracts of reports deposited with them under this act during the preceding year.<sup>e</sup>

The CHAIRMAN. Is a false material statement considered as perjury?

Mr. JENKS. It is severely punished by holding the promoters liable. They must make good their statements.

The CHAIRMAN. That is not quite a penal proposition.

<sup>a</sup> Life assurance companies act, 1870, sec. 14.

<sup>b</sup> Life assurance companies act, 1870, sec. 15.

<sup>c</sup> Life assurance companies act, 1870, sec. 16.

<sup>d</sup> Life assurance companies act, 1870, sec. 18.

<sup>e</sup> Life assurance companies act, 1870, sec. 24.

Mr. JENKS (reading). "Promoters are personally liable," as the law shows. [Printed in full before.]

The CHAIRMAN. Does it require the filing of that information in any special place?

Mr. JENKS. Yes, sir; it is filed in London.

The CHAIRMAN. Where it is accessible to the public?

Mr. JENKS. Yes, sir; it is filed with the board of trade. I have seen it there myself.

The CHAIRMAN. It is very much upon the lines of this publicity bill?

Mr. JENKS. Yes, sir; it is along that line. That is why we in our bill are undertaking to cover a good many of these things. In requiring this amount of publicity we thought we would stop a great many of those abuses. I can say further that so far as—

Mr. EMERY. What you have just read here relates to the conditions required for the issuance of the charter.

Mr. JENKS. Yes, sir; this in regard to the incorporation; but all the way through the law there are requirements with respect to the responsibility of the directors and with respect to stock and the restrictions upon the management of the company; all that is gone into pretty thoroughly. The reason I spoke of that is that I wanted to controvert, if you please, something of the statement that Mr. Emery made, because it seemed to me that we ought not to assume from the way England has succeeded in preventing some of the abuses that her method is primarily in removing restraints of trade. It was found that in addition to that it was putting into a law restrictions very much the same as we have put into our bill.

The CHAIRMAN. I do not think, Professor, that anybody cares to controvert the wisdom of the general suggestion. The single question is whether under the method here it is competent to accomplish the result. The result, so far as I know, everybody agrees with you in; that is, the general consensus of opinion as to the wisdom and propriety of the publicity is agreed to. The main question is whether it is a competency under the provisions of your bill.

Mr. JENKS. There was one other thing, however, which was not brought out and upon which a great many questions have been asked. That much with reference to them. Let me sum up again. If we let an act like the Sherman antitrust act stand upon our statute books without considerable modification in the sweeping nature of its prohibitions, we are bound to force upon the people on the one hand an evasion of the law, not to say a violation of the law—it may be either one or the other—and then in the second place they, in attempting to live under the law so far as they can—under the letter and the spirit even—they will be forced into other forms of combination that will be just as detrimental as anything we have now. It is the wise thing for a legislature to meet a question of that kind openly and fairly, recognizing what business conditions are and saying that we are going to meet those conditions in such a way that business men will be open and above board in what they are doing. Now, that is really all there is back of our bill.

The CHAIRMAN. Now, Professor, while these suggestions are very pertinent and apt, do you at the same time have in mind—which I suppose is the inherent factor—that it is impossible to deal with economic conditions by affirmative penal legislation; that you would

have under any circumstances more or less individual embarrassment?

Mr. JENKS. That is always to be expected.

The CHAIRMAN. The mere fact that abuses exist does not of itself necessarily indicate the occasion for a change, because they do always exist, but the question is whether or not on the whole they have so increased in number. That is your suggestion?

Mr. JENKS. To so great a degree.

The CHAIRMAN. I do not suppose we could expect under ordinary human conditions to affirmatively control economic conditions by affirmative penal legislation. Now the only question is whether they have really increased to such a degree as to require any remedial legislation that would not submit itself to the same criticism?

Mr. JENKS. I would put it in a little different way; I would say whether under existing law abuses exist to so great a degree that it seems likely that we can lessen those evils by a change of the law. It is not necessarily a matter of increase; it is a matter of present existence. Now, as I said before, the passage of the Sherman antitrust act did not stop combinations; it changed the form of the combination, and moreover it changed the form in a way that tended to strengthen the monopolistic features of the corporation. That is to say, it actually did more harm than it did good along the line that it was intended to affect. That act—if it was intended to do anything it was intended to stop monopoly, and in my judgment it actually increased the monopolistic features.

Mr. STEBBINS. In what respect is that true, if I may ask?

Mr. JENKS. Simply in this respect, that the changing of our form of law, and keeping it in the form in which it was put in the Sherman Act—and also, I may say, in the antitrust law of the different States—was to force the people who were making those agreements into one single corporation that could be managed by one man. Now, that gives it greater monopolistic power than if they were combined in a lesser way, simply by agreements from which anyone could withdraw.

The CHAIRMAN. The proposition is that instead of being trustees who represented a large number of corporations and acted through a board of trustees, that all those corporations thus organized together afterwards consolidated themselves into the form of one corporation.

Mr. MARTIN. Right there, I would suggest that that was done in violation of the act, not because of the act. That was done because the act was not enforced.

Mr. JENKS. What the chairman has said with reference to the trustees would of course apply to the few trusts, but as a matter of fact—

The CHAIRMAN. Take, for instance, the commission that investigated very thoroughly the Standard Oil Company. Now, prior to the enactment of the Sherman antitrust law you had an organization such as you have described. Then came along the Sherman antitrust law, and then immediately, or within a short time, you had the Standard Oil Company of New Jersey, which in its organization represented all the different organizations that were created under that trust organization. Now, in that particular matter do you not only increase the difficulty, but increase the control by

reason of the change of form, except, as you say, was more direct or possible under the corporate form than under the lesser general form of agreement represented by the trustees.

Mr. JENKS. There was an intermediate step that was very interesting from the legal as well as from the business point of view. The trustees of the Standard Oil trust were a small number of men. The first act that was taken after it was decided that the trust itself was illegal—

Mr. EMERY. Excuse me; that was under the laws of Ohio.

Mr. JENKS. I am not speaking of that law exactly. The first act that was taken after the dissolution of the trust was to organize a number of absolutely independent companies with, however, identical boards of directors, so that those same directors naturally, each acting for their own companies, acted together just as effectively as they had acted before as a trust, and then there came the still further consolidating, putting more power, relatively speaking, into the hands of the Standard Oil Company of New Jersey. The same thing holds, of course, with reference to every organization. The point I wish to insist upon is that when you attempt to legislate contrary to a distinct point of view—

Mr. MARTIN. Right on that point, and I think that is the vital point of this whole business, and with the permission of the Professor I would like to have the opportunity of interrupting him a moment there to ask if it is not a fact, a manifest fact, that the consolidation into still more compact and monopolistic form of concerns like the Standard Oil trust and the Steel trust and kindred organizations, was due to the failure of the Government to enforce the statute against it, and not to any fault in the statute itself. Is it not a fact that the criminal provisions of that statute have not been enforced against any of those great combinations?

Mr. JENKS. I would answer that question in this way—I still adhere to the position that I took before, that the act itself was, not intentionally, of course, but indirectly, in my judgment, the cause of this change in the form of organization. Whether those men were directly prosecuted or not, there were very many of them, and of course they were prosecuted under the State laws in very many cases. They were of the opinion that they were in danger of prosecution all the time, and so, as their lawyers have doubtless told you, as they have told me, they were devoting their time to seeing how they could do these same things without subjecting themselves to penalty. I think, therefore, it is perfectly proper to say under those circumstances that it was the act itself that led to this change in form of organization. Even though they were not prosecuted they felt in many cases that they were subject to prosecution, and, moreover, we know that the Government has certainly within the last four or five years brought a good many suits that have been prosecuted successfully.

The CHAIRMAN. Is it not the claim of the Standard Oil Company that they minimize the cost of production by their combination?

Mr. JENKS. May I postpone my answer to that for a moment, Mr. Chairman?

The CHAIRMAN. Certainly.

Mr. JENKS. What I was going to say is this: I wanted to say that we ought not to put legislation in the way of making the saving that can come from these combinations. Now I have here some little tes-



timony to show that these combinations, even though I think some of them are not justified throughout, nevertheless do make enormous savings in various ways.

The CHAIRMAN. This law is not only not in the way, but facilitates it, or at least compels it.

Mr. JENKS. Mr. Chairman, I must protest against any such interpretation of what I have said.

The CHAIRMAN. Well, coincident with it.

Mr. JENKS. We will put it in that way.

While I may say that the law, through its unwisdom in certain lines, has perhaps facilitated saving through the employment of illegal means in a good many cases, I think it is extremely desirable that we facilitate those savings through legal and not through illegal means. Now, here is one statement of a man who was the head, for the time being, of one of the whisky combinations. He makes this statement. I read from page 829, volume 1, of the Industrial Commission's report. The statement is by Mr. Bradley, who was the head of one of the combinations. He is one of the vice-presidents of the Distilling Company of America:

We are saving probably in our business not less than \$1,000,000 a year in the Kentucky end of it alone in salesmen, in their travelling expenses.

Mr. Daniel G. Reed, the president of the American Tin Plate Company, calls attention to the fact that they can make large savings through their combination by shipping to the consumers at the nearest point and in that way avoiding cross-shipping, to which I called attention in connection with the steel combination the other day. He says (Vol. I, p. 877):

Q. Are you able to make any material saving by shipping from the nearest plants?—A. Yes; for instance, if we ship from Indiana to New York, the freight is 28 cents a hundred, as I remember now; from Pittsburg it is 11 cents; from Canonsburg it is 2 cents less, I think.

Q. It is your custom to ship from the nearest mill to save the freight?—A. Yes.

He goes along in some detail on that line. I am not going to read much of this, but it is along the line of savings and which is material.

On page 953 Mr. Charles S. Guthrie, the president of the American Steel Hoop Company, calls attention to the savings that they make by having a number of different mills working in harmony through the running of each mill continuously with one class of goods, so that they do not have to change their rolls or stop their mills.

The CHAIRMAN. That is, they went into the form of corporate organization?

Mr. JENKS. Yes, sir; for example, there were several different mills and they had each of them working independently. If they got an order for 20 different sizes of steel hoop in one mill, they would have to stop and change the rolls in order to fill the order, whereas if 10 mills could work together and they got, say, 20 sizes in one order, by distributing the work to the different mills they could all be working continually. It was a decided saving, and he called attention to the fact in this language (Reports of Industrial Commission, Vol. I, p. 953):

We make in the neighborhood of 85 to 90 different sizes, which necessitates frequent changes of rolls. If we give a mill 1,000 tons of one size, there is an economy of \$1 to 1.50 a ton. We can not tell the exact figures, but we do know the saving is very great along that line.

A dollar a ton on the output, taking his lowest figures, of a combination like the American Steel Hoop Company, it is an enormous saving, and, moreover, we can not help but feel that a saving of that kind is in the interest of the public.

Mr. EMERY. I think no one seriously disputes the fact that there are economies of administration possible, but from the evidence presented there, is it a fact that as a rule that saving reaches the consumer?

Mr. JENKS. That is the point I will cover next.

The CHAIRMAN. Are you through with your illustration as to savings?

Mr. JENKS. I thought I would give one or two more very brief ones. Mr. John W. Gates, president of the American Steel Wire Company, on page 1030, Report of Industrial Commission, Volume I, says this:

I should judge that we have dispensed with perhaps 50 per cent of what I should call the high-priced men.

He means the superintendents, primarily, and in part the traveling men. Then, with reference to some of those men, he says:

I think we have dispensed with about 200 travelling men. \* \* \*

And in another connection:

The cross-freight saving is quite an important item. I should think the cross-freights would amount to half a million or a million dollars a year. It is a saving in that particular

And again:

I venture to say that the companies I have been interested in have paid out in twenty years about a million dollars to lawyers, patent attorneys, on account of patents, and we have saved most of that

So on the whole it is simply an indication along the line of saving. Mr. Havemeyer testifies in the same way in reference to saving along another line. I do not know that I need to take the time of the committee, but he makes this statement, that their chief saving of the sugar combination, perhaps, has come from the fact that they can so distribute their work among the different refineries that they can keep the refineries at work all the time by working day and night.

The CHAIRMAN. That is, they can produce a maximum output?

Mr. JENKS. Yes, sir; at the least possible expenditure, and that involves in many cases the closing of some of the smaller establishments.

Now, let me give another illustration of one of the great wastes and evils that come from uncontrolled competition. To go back to the whisky combination again, after they got together they put all of their output into 12 distilleries and increased the total output. In that special case the 12 distilleries, running all the time, day and night—best equipped, best located, and best situated in every way—produced more alcohol than over eighty had done before. Now that, of course, we must recognize is in itself an industrial saving.

I have spoken of these things because I feel that in our legislation we want to be in a position to enable the community at large to get

the benefit of the saving so far as we can, and not to do anything to prevent those savings provided we can stop the other abuses. Now let me say further that I think the people have not ordinarily secured the benefit of these savings.

The CHAIRMAN. Right at that point, is it your view that these organizations of which you have spoken are lawful organizations in the corporate form?

Mr. JENKS. Do you mean under the interstate commerce act?

The CHAIRMAN. Under any act.

Mr. JENKS. I want to have it recorded that I am not a lawyer and could not give an opinion on a technical legal point.

The CHAIRMAN. I expect I really ought not to have asked the question.

Mr. JENKS. My judgment is as regards several of those I have mentioned that under the laws of the different States they probably would be illegal; under the Federal law, so far as the organization is made as a single corporation, I would be inclined to think that they are legal. I have little doubt—although here again I speak with hesitation, not knowing the inside workings of them—that some of them make contracts at times that under the present act would be illegal.

The CHAIRMAN. What I had in mind was simply this, that if a large number of these organizations can be combined into one corporation, eliminating the legal entities that existed before so you have only one entity—now if that is a legal proposition and the organization is legal and valid, I do not suppose we could legitimately criticize anybody for producing that result.

Mr. JENKS. Yes, sir.

The CHAIRMAN. And if that were true, for the purpose of illustration, that the operation of the Sherman antitrust law was to produce that, you have heretofore in existence quite a number of large corporations that were legal in their essence, in their character, that could not be said to be an unlawful or illegitimate result.

Mr. JENKS. No, sir; that is true.

The CHAIRMAN. Economically, of course, it might be subject to criticism.

Mr. JENKS. I was going to say, from that point of view, that I think there can be no doubt that a great many people—and good lawyers—are of the opinion that the organization of a single great corporation, where it gets control of a considerable proportion of the entire output of the country, is probably in itself contrary to the Sherman antitrust act. But the lawyers of the corporation themselves have probably felt that they have kept within the law.

The CHAIRMAN. They have been allowed to exist with impunity; at any rate the Department of Justice knows as much about it as any of us. But is it not the fact that the great vice in all of these corporations—I do not mean the only vice, but the great vice—is what we pretty well understand generally to be the immense overcapitalization, the large increase of stock over and above the actual value of the property invested—either bonds or preferred stock or common stock, resulting in the effort to make earnings which should be adequate in declaring dividends on stock of that character. Now, is that really not the greatest vice in the whole situation?

Mr. JENKS. I was about to speak of that as one of the most dangerous means employed to keep for the corporation these savings that I speak of which would otherwise go to the public.

The CHAIRMAN. I wanted you to have that suggestion in your mind, whether or not that is a very great vice in the situation?

Mr. JENKS. I think that is a very dangerous kind of use; yes, sir. I was going to say, with reference to these advantages that unquestionably exist, that I think the committee ought to be careful about preventing or stopping the savings while checking or stopping the abuses. I am inclined to think that generally speaking so far as these great combinations are concerned the people have not secured the benefit of those savings, and there again I think that the testimony that was taken and the very careful work that was done by some of the statisticians of the Industrial Commission in tabulating and in diagraming the course of the prices, particularly in oil and sugar, and in steel, and in whisky, etc., prove beyond all peradventure that a considerable proportion, if not nearly all, of the benefits that have come from these savings have been kept by the corporations themselves for their stockholders and have not gone to the public in lower prices. I speak of that because it has been claimed by these combinations in many cases, especially by the Standard Oil Company, that they have lowered prices. I think the Industrial Commission proved beyond a question that the Standard Oil Company did not lower prices, but rather that the lowering of the prices came with the normal improvements in business, and influences of that kind.

The CHAIRMAN. The reduction came from natural causes?

Mr. JENKS. Yes, sir; the same thing I think is shown beyond all question with reference to the sugar combination. With reference to some of the others it is not quite so clear, but the tendency seemed to be that way all the time, and we should expect it.

Mr. MARTIN. Was that not also demonstrated in the case of the steel trust?

Mr. JENKS. I should say so; I do not think it was brought out there so clearly.

The CHAIRMAN. The United States Steel Company was not in existence at that time.

Mr. JENKS. The United States Steel Company was organized after a large part of this investigation was made, but before it was ended. The figures covering prices were secured as regards a good many of their products and as respects the raw material that went into them. Mr. Schwab appeared as the president of the company before the Commission and testified, but it was just near the close and after many of those other investigations had been made.

Mr. MARTIN. I understand that in pursuit of this subject you have kept acquainted with the development of the situation.

Mr. JENKS. Not so much since that time.

Mr. MARTIN. It is understood in the world to-day, with which I have a little acquaintance, that the price of rails is nearly one-third higher than it was before the trust was taken off, and I know in the case of springs it is nearly 50 per cent since they bought in a competing company. That was a very large reduction, which was by virtue of that competition. When the trust had complete control of the spring business, the prices were between 30 and 40 per cent. That is the difference since the combination came about.

Mr. STEBBINS. But in the case of steel rails, the 100-pound rails that they have been making, they are inferior to the old 80-pound rails. A year ago the papers were full of articles with regard to these heavy rails; the whole railroad world was stirred up and were very emphatic in their statement in regard to the inferior quality of these 100-pound rails made by the steel trust.

Mr. JENKS. The conclusions with reference to the effect of the prices of steel, including tin plate, steel, and wire, and perhaps one or two other grades of steel, are given in volume 1, at pages 50 to 57.

The point that I was going to make in reply to what was said is this, that when you are dealing with an article like sugar you have the raw material in a perfectly definite form and a finished product of a finished definite form. If you take the prices of raw material and of the finished product and get the difference between them and run them on for a series of years, you can see from month to month exactly what the effect of the combination is. If this difference between the price of the raw sugar and refined sugar goes up half a cent or a cent, you know that means added profits because the cost of the refining is not increased at all. There you have a simple proposition. On the other hand, where you have to determine the reasonableness or the unreasonableness of the price of steel it is a much more complicated problem. So I speak with more hesitation about the effect of the combination on steel than on the other material. The general proposition I have to make is this, that up to date, generally speaking, these combinations have not given these savings, to any very great extent, to the public, although they do doubtless somewhat.

Now, considering the modern conditions themselves, I think the problem that your committee will have to deal with is practically this: We can not in the first instance trust to unrestricted competition to protect the public; in the second place, in connection with that goes this further proposition that there must be some reasonable kind of control that you can put over these companies. The Sherman Act in itself I think did some good in calling attention to the dangers and evils that existed, and I think still more that the Sherman Act has done an enormous amount of good, especially within the last three or four years, in showing the public in general that these great combinations can be held in line by law, through the Government. We have had various suits brought—not so many as some people would like—but a number of suits have been brought under that act, and the Government has won in a number of cases, and I think there has been nothing that has so encouraged the public to feel that they could make headway against these great combinations as the fact that we have been able to win at least against them under the Sherman Act.

So, I think we may say that it has done a good deal of good along that line. On the other hand, I quite agree with what has been said that it has not accomplished so much good in other ways, and I think from the nature of the act itself, if we are going to enforce it in the courts only, that you can only bring a suit here and there; that you can not get hold of any evil until after it is done; then you can try to get some damages. Now, the purpose of our bill goes much further than that. It is to see if we can not prevent a great many of these abuses to begin with, and unless we do in some way or other permit the administrative department of the Government to

take hold we never can do that. So long as the remedy is left to the judiciary, it means that you are going to have some punishment for an act or evil that has been committed: you are going to have, here and there only, a case brought, and the only way in which it is going to prevent the abuse arising is by scaring somebody. By making the remedy of the nature of that under the Sherman anti-trust act, attempting to secure, as I have said before, punishment, you simply lead to an evasion of it, and under the same old form of law you will have the same old evasion going on.

Mr. EMERY. As far as the present act is concerned, you think that the favorable effect of it has been more because people have been more frightened by its thunder than struck by its lightning?

Mr. JENKS. No; you are referring to a different class of people—you are referring to the people who would like to commit an illegal act. I do not have those in mind so much as I have in mind the people who elected the legislatures, etc. I think there has been up to within the last five or six years a feeling that has been very detrimental throughout the country, that a wealthy man—a very wealthy man—the head of a great corporation, was practically above the law and that the people did not have the power to get hold of him. I think that feeling of unrest in the community has been extremely dangerous in many ways.

Now the fact that the United States Government has been able to win a suit (say the Northern Securities case, though I do not think so very much in the way of improving the conditions was gotten out of that), the fact that it could win, and get a decision against this great corporation, has, I think, tended to allay public feeling very greatly. Under those circumstances, it seems to me that we are in a much better position than ever before to attempt to get through some laws that will be reasonable and fair and just along all lines, and not simply to strike out blindly, as was done by many people who had not studied the question, and under pressure that was felt in passing the Sherman antitrust act. It was that pressure of public opinion all the time; the panicky feeling practically that passed the bill. That feeling has, now, I think, largely been dissipated, and I think it has passed away, largely because of the fact that we have won some suits through the United States Government under this act, although I do not think the suits that have been won amounted to much.

Mr. EMERY. Your intimation is that from the standpoint of public policy it would have been wiser and better if the company had been permitted to pool two or more railroads. They all throw light on the subject of unreasonable combination.

Mr. JENKS. I would say this, that if at the time the Sherman anti-trust act was passed an act had been passed that would forbid combinations in restraint of trade that were contrary to public policy, and had provided some way to accomplish that, the situation would have been much better.

Mr. EMERY. My remark just now was addressed to the Northern Securities case, and I was wondering if you thought from the standpoint of public policy in that particular case that it would have been far better for the country for that corporation to hold two roads?

Mr. JENKS. I do not care to talk about that special case just now. I am not judging as to whether it is reasonable or unreasonable.

Mr. EMERY. You want to avoid the responsibility?

Mr. JENKS. As long as I do not hold office I want to avoid the responsibility.

Mr. MARTIN. Before the professor leaves that portion of his argument, I would like to make an inquiry or a suggestion with reference to the matter that he has just mentioned. As provided in the new amended bill, the power to check or control or put a stop to these monopolies would be placed in the hands of the administrative or executive branch of the Government instead of in the hands of the judicial branch. Is it not a fact that the growth of a monopoly is not so swift a thing that it can not be with reasonable promptness put a stop to by the operations of the courts?

Mr. JENKS. The main difference is this, that the acts of the court are of necessity very slow. You start a suit, as Mr. Wheeler has just told us, as in one case on which he was working for two years; he was that time in preparing one suit. Now, if you are going to put that into the hands of the courts, it means that you are going to be three years before you get through it. If, on the other hand, as provided in this bill, when a similar question comes up, it can be practically settled in a few days. So far as the preventive measure is concerned I will refer to that in a moment, but it is a fact that you can get, through administrative means, prompt action, and that is very much better than the long delays that occur in actions by the court. I am willing to allow an appeal to the court if there is any danger of injustice being done.

Mr. MARTIN. The point I was going to make is this, that if the executive department promptly arrested men who violated the law and brought them into court, the beginning of action on that line would have such a restraining effect that it would be about as swift as any administrative action could be.

Mr. JENKS. I will say only one word in reply to that. In my judgment it is a very much better method, and a much better way of handling any great public question to do that without branding people as criminals, unless they are really evil in intent or seriously evil in intent.

Now, to follow the suggestion just made, we would have, under the Sherman antitrust act, in a good many cases to arrest men, if we are going to follow the law out in detail, and bring them before the courts where they have done no material wrong, but feel that they have been forced by unjust and unwise legislation into methods of doing business that may be illegal but nevertheless which they think are right and necessary. Now, if you can have legislation of this kind recommended in our bill you do not brand the man as a criminal beforehand. He may say, "I would like to do this; it seems to me it would be in the public interest, but if on the whole your officials agree that it is probably not in the public interest, let me know it." It is done, and there is no scandal about it.

The CHAIRMAN. Do you mean to say that they are forced by law into unlawful acts? Is not the condition this, that the exigencies of their business which make them feel rather compelled to do things that the law prohibits?

Mr. JENKS. Put it that way, yes, sir; I think that is the wiser way to put it. Let me say again that they themselves believe in many cases that the exigencies of their business are forcing them to do things that while they may be unlawful, nevertheless they still believe would be in the public interest.

The CHAIRMAN. I suppose the whole principle of the economic rule is that the individuals are necessarily dominated by their own self-interest. There is where the public interest and the individual interests perhaps may be in opposition to each other.

Mr. JENKS. In many cases they doubtless are.

The CHAIRMAN. That is the unfortunate feature of the situation.

Mr. JENKS. But I think we can also say that in very many cases the interest of the individual and the interest of the public are identical.

The CHAIRMAN. That may be true, and as a general proposition, as an abstract proposition, we of course have to agree to that.

Mr. JENKS. Let me answer that. It is clearly the opinion of some of the members of this committee, as well as that of some of the witnesses who have appeared before us, that that is true in fact in business life to-day in the United States in very many instances.

Mr. EMERY. Will you pardon just one remark that was suggested by your answer a moment ago. You say that in placing this matter in the hands of the administrative department of the Government scandal would be avoided and reflection upon the proper lawful reputation of the corporation is avoided. Do you not think if the Commissioner of Corporations disapproved of a particular combination as an unreasonable restraint of trade, as the bill provides, that would be a reflection upon that corporation and a reflection upon its business character, just as great as an unsuspected call on the receiver of a bank.

Mr. JENKS. The presumption, of course, in that case—and you understand that it is a presumption—is that the corporation in question is trying to do something that it believes to be in the public interest, whereas, when we speak of the matter of a scandal perhaps being avoided—perhaps the word “scandal” was not well chosen—the public attention would be called to something which was intended and which the man thought was right from the moral point of view, and which would, as a matter of fact, be in the public interest.

Mr. EMERY. I was speaking of the immediate effect, whether the man could get a hearing by beating on the doors, or one administrative door of the Government, begging to be investigated, and the administrative branch of the Government insisting that it did not have the time to make the investigation.

Mr. JENKS. That is probably true.

Mr. MARTIN. One point to which the antitrust act was aimed, and which it prohibits, were combinations formed against the interest of citizens as a whole. Can there be any question that the creation of a monopoly in manufacture and in merchandising and sale and handling of the entire oil business of the country, the entire control of the sugar business unquestionably gives that monopoly which controls those great necessities of life and the power to oppress and to impose an extortion upon the public is unlawful, and they do that very thing. The professor has already testified to that. Now, that being the case, why would not men who deliberately, and in cold blood, intelligent men, with full knowledge of the law, and with full knowledge of



the fact that they are doing a thing which is wrong and oppressive—why should they not be branded by at least an attempt to prosecute them for a violation of the criminal statute.

Mr. JENKS. I think, Mr. Chairman, that I have already practically answered that question, but let me answer it again in this way. While I have already said that in my judgment most of these larger combinations have not lowered the prices, at the same time I do believe that practically all of them have made these industrial savings to a very great extent, and to an extent far greater than is ordinarily thought.

Now, under the provisions of this bill the intention is to secure for the people under similar circumstances the benefit of those savings without permitting the corporations to oppress the people along other lines.

Mr. DAVENPORT. Is it not a fact that you have stated in your last proposed amended bill that you intend to exempt from the operation of this law by such arrangements—for instance, it is claimed that the United Steel Company, or the Standard Oil Company, or the sugar trust are attempting to monopolize business and that they are not protected at all by this bill?

Mr. JENKS. If you put in the word "monopoly;" yes, sir, and I will tell you why, so far as I am personally concerned.

Mr. DAVENPORT. I say, is it not a fact that these great combinations would not come under the sheltering arm of this amended bill?

Mr. JENKS. That is in that particular. Let me reply to that. Personally speaking—and I speak now in distinction from the committee that has been working on this bill—personally I have said that I believe there is such a thing as a reasonable monopoly in the public interest, although, generally speaking, I think monopolies are contrary to the public interest, and I think also that anything that looks toward monopoly needs to be very carefully watched and checked. Now, I myself, individually, would have been in favor of not excepting from the action of this bill that second section; I would have preferred to let them come with all the others, believing that the question of reasonableness and unreasonableness should not be restricted but should work with the others. On the other hand, I recognize as fully as anyone can the feeling that there is in the country against monopoly of any form, which is natural enough and instinctive enough, but which nevertheless sometimes is possibly unreasonable. I think that it is extremely desirable to have some act of this kind passed. I realize the pressure that will be brought to bear on any Representative who would permit anything to go by him which looked as if it could in the most remote way favor monopoly. So as a matter as practical politics, and of getting as much as we can that is good, I myself am willing to make that distinction.

The CHAIRMAN. That section of the amended bill exempts that.

Mr. DAVENPORT. But it is in italic.

Mr. JENKS. It is page 4, Mr. Chairman, which, with the italic part of section 11, reads in this way:

SEC. 11. That any corporation or association registered under this act, and any person not a common carrier under the provisions of the said act approved February fourth, eighteen hundred and eighty-seven, or the acts amendatory thereof or supplemental thereto, being a party to a contract or combination hereafter made other than a contract or combination with a common carrier

filed under section twelve of this act, may file with the Commissioner of Corporations a copy thereof, if the same be in writing, or if not in writing, a statement setting forth the terms and conditions thereof, together with a notice that such filing is made for the purpose of obtaining the benefit of the provisions of this section.

No prosecution, suit, or proceeding by the United States shall be begun under the first six sections of this act for or on account of any such contract or combination hereafter made, of which a copy or written statement shall have been filed as aforesaid, or for or on account of any acts done in performance thereof by or in behalf of such corporation, association, or person, unless such contract or combination shall be in unreasonable restraint of trade or commerce, as defined in section three of this act, or shall constitute a conspiracy in violation of section one or of section three of this act, or shall be in violation of section two of this act. If in the opinion of the Commissioner of Corporations any such contract or combination of which a copy or a written statement shall have been filed as aforesaid shall be in unreasonable restraint of trade or commerce, as defined in section three of this act, or shall constitute a conspiracy in violation of section one or of section three of this act, or shall be in violation of section two of this act, said Commissioner shall be authorized and empowered, and it shall be his duty, to enter an order to that effect, which order shall set forth briefly the grounds upon which it is based. Any such order may be made by the Commissioner upon his own motion and without notice or hearing within thirty days from the date of the filing of such contract or written statement. After the expiration of such thirty days no such order shall be made by the Commissioner except after notice to the party or parties who filed such contract or written statement and after giving such party or parties an opportunity to be heard, and such order shall take effect upon a date therein to be specified not less than ten days after the filing thereof; but any person aggrieved by such action of the Commissioner of Corporations, or the United States in case of his nonaction, may apply to the Interstate Commerce Commission for a rehearing of the case; and said Commission (with which the Commissioner of Corporations is hereby authorized to sit for the purpose of such rehearing with the powers and duties of a member) is hereby authorized and directed, after due motion to rehear such case and thereupon to enter such order in the case as seems to it proper, subject, as in other instances, to appeal to the courts as hereinafter provided. If any party or parties to any such contract or combination, of which a copy of a written statement shall have been filed as aforesaid, shall do any act in performance of such contract or in pursuance of such combination after the Commissioner of Corporations or the Interstate Commerce Commission shall have entered an order as aforesaid, such party or parties, unless such order of the Commissioner on the rehearing hereinbefore provided shall have been replaced by a new order or such order shall have been suspended or set aside by order of the court, as herein provided, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine and exceeding five thousand dollars or by imprisonment not exceeding one year, or both said punishments; and the United States may institute and maintain proceedings in equity under section four of this act to prevent and restrain the performance of such contract and the continuance of such combination and any action pursuant thereto in violation of this act.

No corporation or association authorized to register under section nine of this act shall be entitled to the benefit of this section if it shall have failed so to register or if the registration of such corporation or association shall have been canceled; and the United States may institute, maintain, or prosecute a suit, proceeding, or prosecution under the first six sections of said act for or on account of any such contract or combination hereafter made of which a copy or written statement shall not have been filed as aforesaid or as to which an order shall have been entered as above provided.

Any party affected by any such order entered by the Commission may institute and maintain a suit to enjoin, set aside, annul, or suspend such order in the supreme court of the District of Columbia, and jurisdiction is hereby given to such court to hear and determine such suits and to grant such relief; but no interlocutory order or decree enjoining, setting aside, annulling, or suspending any such order of the Commission shall be granted except after not less than five days' notice to the Commission. The provisions of "An act to expedite the hearing and determination of suits in equity, and so forth," approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary

*injunction. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.*

No corporation or association for profit or having capital stock, and registered under this act, that hereafter shall make combination or consolidation with any other corporation or association, shall be entitled to continue its registration under this act, unless without delay it shall file with the Commissioner of Corporations, pursuant and subject to the provisions of this section, a statement setting forth the terms and conditions of such combination or consolidation, together with a notice as hereinbefore provided.

Mr. JENKS. We will let section 2 of this act stand.

The CHAIRMAN. Section 2?

Mr. JENKS. Yes; that is the one that forbids monopoly.

Mr. DAVENPORT. But I was about to direct your attention to the fact that the importation of this new change, or the making of this new change in the bill as proposed, imported into it an obscurity and an uncertainty and a contradictoriness that of itself would make the act wholly unintelligible and wholly unenforceable, because the first section prohibits all combinations and conspiracies in restraint of trade between the States, and the second section prohibits monopoly or tends to combine this monopoly. The latter are included in the first. The means are included under the first provision of the first section. Now, with one breath you bring the thing under the operation of this law, and at the same time you take it from under it, so that when you come to the practical administration of the law you have made confusion worse confounded. Of course the making of a statute is the most practical thing in the world. It has to be clear as to how it is to act, and clear in the interpretation and construction and enforcement of it. Now, you can not expect the things from the operation of this act under the second section and at the same time accept them under the first without making confusion worse confounded.

Mr. JENKS. I am very agreeable to your suggestion along that line. I may say, however, that I could not fully accept it, as I am unable to accept other interpretations that have been offered. I am very glad to have your suggestion, nevertheless. I have said that, considering modern conditions, we could not trust to unrestricted competition. There must be some control. The Sherman Act has done some good, but the Bureau of Corporations has done more, I will say, by getting at the facts as to wrongful acts in many cases in connection with combinations and by giving publicity to those facts, and that will do still more good.

The CHAIRMAN. What does the Bureau of Corporations do from the public standpoint?

Mr. JENKS. I think that they have done a very great service; it was that that I have in mind—

The CHAIRMAN. I mean in the line of publicity, or perhaps you intend to discuss that.

Mr. JENKS. I was going to say that as far as the Bureau of Corporations is concerned it has made known a good many facts much more definitely than they were ever known before with reference to two or three corporations, and this work has been pretty general; but the Bureau has been doing more, I think, that has been of very great

service—it has given the Department of Justice an opportunity to act in the way of getting through its cases. This bill proposes to go somewhat further. It is intended by this amendment—

The CHAIRMAN. What particular legislation does this tend to promote?

Mr. JENKS. I trust that the Bureau's information is tending to promote this legislation.

The CHAIRMAN. That may be, but is there any other?

Mr. JENKS. I am not aware that it has aided other bills as yet. What I had in mind was this, that the public is getting enlightenment on this question to a very great extent, much more accurate enlightenment than ever before, and I think that is very important. I think the Bureau has been helpful in circulating that information which has certainly been helpful to us in connection with this, and I hope it will be still more so. It is intended by our bill to secure regularly facts that will, to a considerable extent, show the profits, the methods of concealment of profits by means of stock watering, to which attention has been called, and in other ways; and in that way will, in the first place, indirectly tend to lessen some of the abuses of these corporations by encouraging competition within the lines where that can come, or by threatening competition, and by enabling the Government (still further than that) to see how it can better control those organizations.

Now, I want to reply more directly to the suggestion made by Mr. Bijur, a very acute suggestion, which was that these lines of inquiry that have been suggested in our bill are what would be very likely indicated by the President, and that these lines do not show exactly the way in which these abuses could be met. In part, of course, they would; when, for example, we got the facts with reference to stock watering. That is a very direct way, I think, of checking the abuses, but in other lines our bill does not get the information needed. But the Bureau of Corporations exists, and the Bureau of Corporations does now do, and will still continue to do—because our bill does not affect it—great service in this direction. Its investigations are still going on along the lines suggested by Mr. Bijur. So I think with these two lines of publicity we are very likely to accomplish much that has not been accomplished before in the way of letting us know how we can best check the abuses of the corporation, and those two lines of investigation and two lines of publicity, I think, will be all that we need.

The CHAIRMAN. Right at that point, what do you think of the propriety of this provision which you have here which authorizes the President from time to time to increase the conditions, or add new conditions, or add to the regulations by virtue of which the corporations are entitled to registration? Is that open to any adverse criticism, in your judgment? Do you think it is wise or proper?

Mr. JENKS. I made this statement with reference to that matter when I was here before, that what is desirable is this degree of publicity with reference to corporations; that the first suggestion that had been made in the committee, on drafting this bill, was that the specific questions be put into the bill itself, and that then afterwards it was thought that it would be simpler to give that power to the President. Another reason why it was thought that it would perhaps be better to leave that in the discretion of the President than to put

it in the bill itself, was that conditions were changing from time to time, and that it might be well to add questions here and there; some question would perhaps become of no particular use and could be dropped out. The President could thus modify the questions, so as to fit the conditions, better than the legislature could if it put the conditions into the bill. That was the first thought, and that was my preference to begin with, until we had thought it over very fully. If you put these questions into the bill, ten years from now it is very likely that some of these questions will not be to the best advantage; and, nevertheless, when it comes to the amendment of any act of Congress it is a rather difficult thing. Now that is the only objection to putting questions into the bill. I have felt, and I think most of us have felt, that the President in preparing these rules for these inquiries would of course act under the advice of the law officials of the Government to a considerable extent, and under the advice of certain Members of Congress and others—the President usually does—and he would then so frame those inquiries that at the time they would meet the conditions best, and as far as I am able to judge I think that history will show that we have never had a President, from the beginning down, who would frame a series of questions that would be seriously injurious.

The CHAIRMAN. We all appreciate the fact that there is quite a difference of opinion among different people as to what is really proper, and the question with me now is to have a set of regulations to-day—and the regulations to-day might simply involve what you might call public regulations or indications of what the public desires. It is quite open for the President under this provision to disclose matters that would disclose its material affairs, its prices and its dividends, etc., which might of course be a very different thing. Now, you might have one set of regulations to-day and you might be threatened with an entirely different set a year from now. Is that, in your judgment, in any way a valid criticism of the scheme?

Mr. JENKS. To be perfectly frank, I do not think it is very valid, and for this reason: When any measure of this kind is under consideration—

The CHAIRMAN. Perhaps I should not say valid, but serious, criticism.

Mr. JENKS. I do not think it is very serious, and my reason for that opinion is this—I am trying to speak perfectly frankly and I trust I will not be considered too severe; but when any important measure of this kind is under consideration those who are opposed to it very naturally—and I shall not say improperly—very naturally exaggerate the evils that may arise; they see the evils and naturally see them amplified or exaggerated, and in presenting them they do not present what is likely to happen but what might happen. I grant you under the circumstances that we can imagine a President who could be elected who would put a series of questions in that would seriously injure the business of the country; I grant that; but on the other hand I would say there is not one chance in a hundred thousand, no matter who is elected, of which party, of a man being elected who would put in a series of questions that would seriously injure the business of the country. He could not afford to—granting that we had a President who was unpatriotic enough to want to do it. Any President who would put a series of questions

that would be unjust or unreasonable in their nature, or which would tend to injure the business interests of the country, would wreck his party.

Now, I want to recognize frankly, when we are proposing a measure of this kind, the conditions under which we are acting. The President is working under such conditions that he can not do these radical things. I remember a statement that I ventured to make after one of our campaigns, when a good many people thought our Philippine policy was wrong—I mean after we had gotten control of the Philippines—and they were speaking of the various things that would happen if Mr. Bryan was elected. I remember saying after the campaign that if Mr. Bryan were elected the conditions were such, the work that was already going on was such that he could not materially modify the policy already adopted. And so I would say that would be the case now. If instead of having a Republican President we should have a Democratic President, the probability is that the line of questioning would not be very materially different.

The CHAIRMAN. Let me call your attention to this fact. Mr. Bryan, as I understand it, has already suggested on a great number of occasions, in the discussion of great economic questions, that a corporation or combination that would control 51 per cent of the output was, in his judgment, an unlawful and improper one—what he called a bad trust. Now, is it fair to assume that that is his view, and he is an honest man—

Mr. JENKS. He is an honest man.

The CHAIRMAN. It is an arbitrary position to be sure, and if he does entertain that view—I am not quite sure that I have quoted him literally, but he does entertain something of a view of that kind—we would naturally expect the Commissioner of Corporations selected by him to reflect his views on that particular proposition, and that would certainly eliminate a great many corporations of this country from the operation of that bill. Now, with that staring them in the face, what would be the effect on this Presidential campaign—that is, what sinister construction could be placed on it?

Mr. JENKS. Personally, I should prefer not to give partisan or political advice: I would rather prefer to answer the question from the other point of view.

The CHAIRMAN. But we want to be perfectly frank about this matter. Would it be open, that is, reasonably be opened, to the political criticism that the tendency of such legislation was, for instance, to maintain the existing administration?

Mr. JENKS. I think it would be open to that political interpretation before the election; it would be futile to say that after the election, granting that the Commissioner of Corporations were instructed that he should consider unreasonable the organization of any corporation that apparently had more than 51 per cent of the output, we would get some extremely valuable lessons within the next year or two with reference to business that would probably result in some excellent legislation for a long time in the future.

The CHAIRMAN. I am not certain that I quite agree with you as to the after effects, but we are all aware that the operation of the Bureau of Corporations has been subjected, as a matter of fact, to a great deal of political criticism, of course partisan in its character.

Now, the point I had in mind was whether we were not laying the foundation, by a bill of this sort, for criticism that has very much more foundation, coming from the same source and having the same inspiration.

Mr. JENKS. I think enough has been said in the hearing with reference to the nature of the power that was put in his hands.

Now, let me take up for a moment one other question, which is somewhat more closely along legal lines. The statement has been made here repeatedly with reference to the making of one definite standard by which the Commissioner should declare that, in his judgment, any proposed contract was reasonable or unreasonable. After Mr. Wheeler's very emphatic statement here this afternoon, I do not need to dwell on the legal end very much, but there are one or two points that I want to speak of. In the first place, I want to call attention, rather emphatically, to one of the cases that was cited pretty early in the hearing. It is in 26 Indiana Appellate Court Report, the case of *Cook v. The State* (26 Ind. App., 278).

The CHAIRMAN. That was the case cited by Mr. Davenport?

Mr. JENKS. Yes, sir; the Tire case. Attention was called to the fact that it was decided that there was such indefiniteness in the statute that the statute was void. Now, I think we need to take into consideration what it is that we are here considering when we are using words along that line. It is a very simple thing if you are saying that there must not go over certain roads a narrow-tired wagon, and say that you mean a 2-inch tire. As a matter of fact, in the State of Indiana afterwards they prescribed 4-inch tires as wide tires for certain kinds of roads. Now, that, in the very nature of the case, is something that can be made perfectly definite and clear and could be put in inches just as well as not, and there is no one who misunderstands the wisdom of the court in making that decision. Now, let me call attention to the fact that the court is able to use general expressions if they have been properly interpreted. The court says (p. 281):

In this State we do not have any common-law crimes, and criminal prosecutions can be maintained only for offenses denounced as crimes by statute; but where a word or phrase had a definite meaning in the common law, before the enactment of a statute which employs such word or phrase to designate a crime, as the phrase "public nuisance," the court in construing the statute will apply to such word or phrase its well-ascertained meaning at common law. (*State v. Berdetta*, 73 Ind., 185; 38 Am. Rep., 117.)

The proper construction of a statute must be the work of the court.

Now, the point I make is that the word "reasonable" is a word that does have a clear, definite meaning in the common law, and has had for centuries. It is a word that is not indefinite in its nature on that account, and therefore may properly be put into even a criminal statute.

The CHAIRMAN. You think it is apparently as clear as a public nuisance?

Mr. JENKS. I think it is apparently as clear as the expression public nuisance, and the kind of thing that you are mentioning must determine the nature of the term you use. In that connection I want to say that you can not get, in my judgment, any more definite word that can apply in such connection as this than the words "reasonable or unreasonable." I was very much interested, and had hoped for a time that something might come out of it, in the statement made

by the representatives of the Merchants' Association when they said we ought to assume to define in the statute in some way or other what was meant by "reasonable." We ought to fix a standard in some way or other. In my judgment there is no possibility, when you are considering a question as complex as is the question of restraints of trade, or of the benefits or lack of benefits of monopoly and things of that kind—there is no possibility of getting any word that is more definite than the words "reasonable" or "unreasonable." Moreover, that word in itself has been taken at different times as a standard, as, for instance, in this decision of Judge Taft's in the Addyston Pipe and Steel Company case, which has been cited (85 Fed. Rep., 271). I take only a few sentences from it (p. 282). Referring to the decision of Chief Justice Tindal, in *Horner v. Graves*, he quotes the following:

We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy.

The CHAIRMAN. That was a civil act; they were deciding the validity of a contract.

Mr. JENKS. Yes, sir; and further on in the decision he quotes others.

The CHAIRMAN. But you realize the distinction between a civil right and Federal statute?

Mr. JENKS. Of course. Further on Judge Taft says:

The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraint may be judicially determined.

That is, he recognizes that where a contract has a main purpose clearly conceived, reasonableness is in itself a "sufficiently uniform standard." To us it seems that in a case like the present, where the public interest is the main purpose, there can be no better one.

Now, Judge Taft, in that same case, goes on to say that contracts that were in unreasonable restraint of trade at common law were not unreasonable in the sense of being criminal or in giving rise to a civil action for damages (p. 286). Now, the effect of our statute of 1890—the effect of the Sherman Act—is to add a criminal aspect; that is, we have brought in through the Sherman Act a new point of view that did not exist in the common law.

The CHAIRMAN. Judge Taft was considering the Addyston Pipe case combination?

Mr. JENKS. Of course. It was a different thing; but the Sherman Act has brought this criminal aspect into the contract in restraint of trade that did not exist there before, and inasmuch as that criminal aspect is brought in, such contracts are now unlawful in fact, whether reasonable or unreasonable.

Now, it seems to me the question is not primarily whether the thing used to be criminal or heretofore was not criminal. That is the question that the chairman has asked at various times. He says:

Are not all of those cases that you are considering civil cases; did they have anything to do with the criminal law?



Of course they did not. The question is not whether—

The CHAIRMAN. The question was as to all the cases relating to contracts or to conspiracies against trade. That is an entirely different question. You did not put into my mouth the question I asked. That was probably on account of the effect and existence of the legal combination.

Mr. JENKS. You have at various times asked whether those contracts in restraint of trade did not refer to people themselves out of business.

The CHAIRMAN. My question was whether the court was trying a question in civil suit.

Mr. JENKS. Yes; that is so.

The CHAIRMAN. That has no bearing on whether the statute ought to have certain language in it.

Mr. JENKS. It seems to me the question before us now is this: Granting that this act—the Sherman Act—is a criminal statute within these limits that are laid down, the question is whether the doctrines and the distinctions in meanings of words that were established in civil cases along the same line and on the same subject did or did not lay down a sufficiently precise test for criminal purposes here in this law and for the test of criminality in this line.

Now, it has seemed to us that they do, and I go a little bit further—

The CHAIRMAN. Have you any authority along that line?

Mr. JENKS. Do you mean whether I have any cases?

The CHAIRMAN. Have you any authority that holds that, or where any court has used language or suggested propositions like that which justified the court in holding the contract void because it was or was not reasonable or because it was unreasonable; have you any authority that holds that that language is sufficient in a penal statute?

Mr. JENKS. The only authority that I can cite is the one that I have just read.

The CHAIRMAN. That does not go quite far enough.

Mr. JENKS. It seems to me that in a criminal statute where you do have the same word that has been used and interpreted repeatedly in civil cases that word has been interpreted sufficiently in the law of that nation.

The CHAIRMAN. Brother Smith called the attention of the committee to a case in the supreme court of the District of Columbia which held that indefinite language like that was insufficient. It must have been looked over by some official in the office. The court held the other way; it held absolutely that it was insufficient. I guess he has not read the case.

Mr. JENKS. I do not know about that. I did not happen to be here when it came up. What I was about to say is that this statute, this Sherman Act, has made a new crime—so far as this country is concerned that was a new crime—the making of contracts in restraint of trade, and under those circumstances, if we are going in any way to modify that act that defines the crime, we must in some way or other define the modification of it. The act has said that the crime consists in acting in restraint of trade. We propose that Congress declare that the crime is making an “unreasonable” contract in restraint of trade.

The CHAIRMAN. Is it not the same thing if you discuss either branch of this statute, for the reason that with respect to the contract in restraint of trade it is almost impossible to predicate that upon the Sherman antitrust law?

Mr. DAVENPORT. In 200 U. S. the Supreme Court has decided that that kind of contract is not within the Sherman antitrust act in the case of the Cincinnati Packet Company.

The CHAIRMAN. Well, that eliminates it altogether from the discussion. What I was suggesting is this—and it is really the question that we have to meet—whether we can properly predicate that upon a combination or conspiracy in restraint of trade.

Mr. JENKS. I would call your attention again to what I said when I was here before, to the effect that in my judgment it is unfair to use the words "combination" and "conspiracy" in the same connection, because the word "conspiracy"——

The CHAIRMAN. I will say for your benefit that your legal adviser, Mr. Smith, said that they are exactly the same. That is what I understood him to say the other day. But you are not bound by that.

Mr. JENKS. I will go further than that. I would like to question Mr. Smith in connection with that matter, not that I wish to imply that that was not a fair interpretation.

The CHAIRMAN. The only thing he said was that unlawful means a combination for unlawful purposes; that that was the same as conspiracy for unlawful purposes. Suppose you leave out "conspiracy." I do not wish to embarrass you in your discussion.

Mr. JENKS. What I was going to say was simply this: A combination in restraint of trade, I grant, is unlawful under the Sherman Act, but it would not be unlawful if it were not for the Sherman Act.

The CHAIRMAN. It would not be an offense at all under the commerce laws if it was not for the Sherman Act, or Federal in its character but for the Sherman Act.

Mr. JENKS. Now, generally speaking, under the common law any combination that is contrary to public policy would be unlawful, but the word "combination" in itself in no way implies anything unlawful. The word "conspiracy" in itself implies what is unlawful, and that is why I wish to separate them. I think it is entirely competent for us to say——

The CHAIRMAN. One moment, in order to get at the legal aspect of it. Do you have in your mind a legal distinction between a combination to accomplish an unlawful purpose and a conspiracy to accomplish an unlawful purpose?

Mr. JENKS. No; I have in mind a combination to secure a lawful purpose.

The CHAIRMAN. Here is the Sherman antitrust law, which prohibits combinations in restraint of interstate trade, and it also prohibits conspiracy in restraint of interstate trade. In your mind is there a distinction between those two propositions?

Mr. JENKS. The difference in our judgment is that you are applying the word specifically to the Sherman Act.

The CHAIRMAN. We can not apply it in any other way. We must necessarily confine our hypothesis to existing facts. Of course if I misunderstood you it is my misfortune, and I did not intend to con-

vey that idea. The point I had in my mind was whether in your mind there is any legal distinction between a combination in restraint of trade under the Sherman antitrust law and a conspiracy.

Mr. JENKS. Probably not, under the Sherman law. Now, what we are proposing is this: We are proposing what in effect, although not directly in legal terminology, would amount to an amendment of the Sherman antitrust act to the extent that it might permit under certain circumstances contracts or agreements in restraint of trade provided they were reasonable, but we would not permit any contracts that in their essential nature would be unlawful. That is why I struck out the word "conspiracy," because the word "conspiracy" implies unlawful.

The CHAIRMAN. Conspiracy is the name of a crime under the common law, but that crime can be committed in two ways, but in one way equally as well as the other, first by combining to do an unlawful thing, and secondly by combining by unlawful means to accomplish unlawful ends. It is equally so under the antitrust act. One is contradistinguished from the other. You are going to have a reasonable conspiracy under the Sherman antitrust law as well as an unreasonable combination.

Mr. JENKS. The only difference of opinion we had, I think, was that I was thinking of the act as amended and you were thinking of the act as it exists.

Mr. EMERY. If you will pardon a question, do you not think when you attempt to give a term that has never received anything but a definition in the civil cases, do you not think when you attempt to apply that to a criminal statute that you are attempting to give a broad construction of the phrase rather than a narrow one; and secondly, do you not think when you do that you have created a constructive crime by such interpretation?

Mr. JENKS. No, I think not, in the way you have suggested it. Let me add a word further. If we put into the criminal statute a word that has been repeatedly interpreted in civil suits, and when the crime is really a crime civil in its nature, if you wish to put it that way, or a crime economic in its nature, then it seems to me we may expect to use practically the same meaning of the same word. Take, for example, a restraint of trade, that we will say under ordinary circumstances, without the Sherman Act, would be in the public interest, it would be considered reasonable. Suppose we take that same act, by the Sherman law it at once becomes illegal, but not necessarily unreasonable. Now, if we were to interpret the meaning of the word "unreasonable" we would use it identically in the same sense. In the one case it is what has been made a crime and in the other case one that has not been made a crime.

Mr. DAVENPORT. Is it not a fact that under precisely similar circumstances the courts have uniformly held the other way? There is, for instance, nothing more familiar to the profession and to everybody than that charges for transportation must be reasonable and that a party can not be compelled to pay more than is reasonable, and if overcharged can recover back the excess beyond what is reasonable. Now, when the different States and the Congress of the United States have attempted to make that a criminal offense the laws have been held void for uncertainty. I notice that you did not refer to those cases which I have quoted here.

The CHAIRMAN. The Professor is not through. He may refer to that before he gets through.

Mr. DAVENPORT. I wanted again to call your attention to the fact that in the Thirty-Fifth Federal Reporter, in the opinion delivered by Mr. Justice Brewer, it was held that a law which provided that if any railroad company should charge more than a fair or reasonable rate the company should be guilty of extortion. Then he goes on to say that that is obnoxious to all principles of criminal statute making; that it is void for uncertainty, for want of a standard to measure the legislative intent by. What is "reasonable" or "unreasonable" is left undefined.

Then, in a case arising under the interstate-commerce act (*Tozer v. U. S.*, 52 Fed. Rep.), there is a like decision. Mr. Justice Brewer there says that that act was void in that respect on account of its uncertainty. He says:

Applying that doctrine to this case——

The CHAIRMAN. Professor Jenks had the benefit of examining your statement, and if he has any occasion to comment on it I assume he will do it before he gets through, so that will take care of the legal discussion in his point of view, unless there is some specific question that you want to ask.

Mr. DAVENPORT. I wanted to point out that the very distinction that he now attempts to make, and the very construction that he now says would be imported into the law have been expressly repudiated by the courts. Unless he has some authority to the contrary, for I must confess I have not been able to find any, I must still adhere to the correctness of my contention.

The CHAIRMAN. You have seen these cases, have you, Professor?

Mr. JENKS. I have seen some of those cases. I would say in reference to what the chairman said a moment ago that Judge Davenport's testimony has not been put into my hands and I have not had the opportunity of reading it. Part of it I have seen and part of it I heard, but I did not hear the whole of it.

The CHAIRMAN. Of course the professor can not be expected to comment on a case that he has not examined. What case was that in, 20 United States, Mr. Davenport:

Mr. DAVENPORT. The Cincinnati Packet Company *v.* Bay.

Mr. JENKS. I want to call attention to this one point, that after all we are under the Sherman antitrust act; we have a new application that we never had before of the use of these words. In the second place, in the amendment that we are proposing, we are proposing to make a new act that we grant is new. It is constructive legislation; it is something we have not had before, and it is very desirable (I think we can not be too grateful to those who have attacked the bill for their calling attention to the fact) to have the law itself as definite and as precise as it can be. I grant all that. Now, on the other hand, the only contention I have in opposition to that is this: In the first place, the words "reasonable" and "unreasonable," although used here in a somewhat different connection, have been so long interpreted, and so thoroughly interpreted, in England and in this country by our State courts, etc., that they form a pretty good test by which we can judge of what they mean to imply, and can judge any circumstances which will fit them in distinction from those in

which they have been placed before. Now, in the second place, and I think this is really vital—I should like to say that there is no possibility, in my judgment, of getting any better standard or any more definite standard for determining whether a combination should be considered in the public interest or not than that word “unreasonable.” The chairman has suggested a good many times that contracts in restraint of trade after all virtually come back to the question of prices. Now, a good many people have touched on that, more or less, and I can say that I think the chairman is wrong in that regard. In a good many cases they do come back to a question of price, but a great many contracts may have nothing to do with prices, owing to the fact that the prices—

The CHAIRMAN. What sort of contracts do you have in mind?

Mr. JENKS. I have in mind a number of things that occur to me. Supposing, for example, that it was suggested between two corporations that they would, we will say, hire nothing but union labor. Now, I am not sure that you can in any direct way connect that with the question of prices, nevertheless it is a contract that very likely may be submitted to the Commissioner of Corporations.

The CHAIRMAN. That sort of corporation, constituted in that way, would not come anywhere near the Sherman antitrust law.

Mr. JENKS. I am not sure that it would, but it might. This is, let us assume, a contract made between two railroad companies engaged in interstate commerce. They might go further and say that as far as we are running between different States we may employ nothing but union labor. It might be referred to the Commissioner for decision. If he were going to decide on that he would consider whether or not that was in the public interest: whether it was reasonable or not. He could not take it back to any question of price; he could not make any standard along that line.

Mr. EMERY. I can not possibly see any relation between the employment of any kind of labor—whether it was red haired or black haired or blue haired and interstate commerce. In fact the Supreme Court says that it could not see any difference.

Mr. JENKS. There is a great difference of opinion as to where it would come in. The point I have in mind is that a contract of that kind might very well be considered. Take a different example: Supposing that two employers who are engaged regularly in interstate trade agreed that they would ship only by a certain line, or some freight by water and other by rail along different lines. I am inclined to think that those contracts would be considered contracts that might be, at any rate, in restraint of trade.

As Mr. Wheeler said awhile ago, the question of price comes in indirectly, but it can not come in in any way that would make it a test. I am simply citing possible contracts that would be made. The point I have in mind is that you can not fix any standard that would cover the almost infinite variety of contracts that would come up along this line any more definite than is the word reasonable or unreasonable as it has been interpreted by the courts for hundreds of years.

The CHAIRMAN. Suppose the committee should be of the opinion, after examining these authorities, that the court would not sustain any criminal or penal authority, would you want us to report such legislation?

Mr. JENKS. No; I should certainly not. It seems to me the President very wisely, in his last message a few days ago, said that he thought Congress ought to be very cautious and not pass measures that they thought were unconstitutional.

The CHAIRMAN. That is, if on examination of these authorities we are of the opinion that this was in effect an amendment of the Sherman antitrust law and imported an uncertain feature in the matter of crimes, you would not want to see an amendment adopted that would "massecrate" the whole statute?

Mr. JENKS. I would not want the committee to recommend any legislation that they clearly thought would be declared unconstitutional, or which would render this act as amended in this way void.

The CHAIRMAN. It might not be certainly a constitutional provision, but a man has a right to have his offenses specifically defined.

Mr. JENKS. Well, render the act void. No; that ought not to be. On the other hand, it is incumbent upon this committee, in my judgment (while it ought not to recommend any legislation that it thinks would be void or unconstitutional), to do the best it can to meet an extremely complicated situation just now, and in the judgment of certainly some good lawyers—Mr. Wheeler, for example, and a good many others—these words reasonable or unreasonable are definite enough.

Mr. DAVENPORT. Did he state that?

Mr. JENKS. I understood him to say in this connection that he did think it would be valid.

Mr. DAVENPORT. Did he not promptly repudiate any such idea?

Mr. JENKS. I understood when you put some cases specifically before him, which seemed to be cases that could not come up under this statute, he agreed with you, but I think on this line he agreed absolutely with the position we have taken in the bill.

The CHAIRMAN. Yes; I think that was the position Mr. Wheeler took.

Mr. EMERY. Do you assert that you can find anywhere in the common law the words "reasonable" or "unreasonable" used in connection with the restraint of trade as a definition of crime?

Mr. JENKS. My point is that the restraint of trade under the common law was not a crime.

Mr. EMERY. Permit me to call your attention to the fact that from 1346 practically up to George III there is a series of statutes on the subject of restraint of trade, and I think the first use of the modern term "restraint of trade" is found in the statute that I have here, passed in 1436. It says:

All agreements in restraint of trade are declared unlawful and void.

That is practically the first use of that modern term that I can find. There must be 200 statutes based on that at various times between that period and the present day.

Mr. JENKS. The question, as I intimated some time before, as to the principle of the common law, in my judgment—

Mr. EMERY. That is statutory law.

The CHAIRMAN. The particular point as to the term "restraint of trade" that the Professor has in mind is a condition that never had the criminal situation predicated upon it, and there the Professor is

right. Your contention is that the term "restraint of trade" has been used in criminal legislation.

Mr. EMERY. I say the term "restraint of trade" has been used constantly. I spoke of it, Mr. Chairman, because it seemed to me that under the very form of argument that the Professor makes that he is doing that which precisely defeats the very object that he aims at—that is, that he finds the language to have been used only in connection with civil cases. To say that you could import that language into a criminal statute would have no other effect than to say that you could create a new crime by construction. That would be against the theory of construction, which requires a strict construction.

The CHAIRMAN. Now, before you depart from the proposition of prices I would like to know what you say about the question whether or not that is not the important feature and the point of contact where the interest of the public touches the question of common interest, conspiracies, and restraint of trade.

Mr. JENKS. I am inclined to think that is true. At the same time, as I was thinking over the various kinds of contracts that were to be made, I was somewhat in doubt as to whether you could put it quite so strongly as that. Suppose, for example, an agreement between two combinations to sell only certain brands of goods. On an agreement of this kind—

The CHAIRMAN. Would not that quite obviously affect the prices to sell certain brands of goods, of course, would necessarily control the market, and what purpose could there be?

Mr. JENKS. It doubtless is connected with price.

The CHAIRMAN. Not per se, but my point is this: Whether or not as a resulting factor in the ultimate analysis you do not get down to the prices to the consumer; is that not really the factor that justifies us in legislation?

Mr. JENKS. That is doubtless an extremely important one. The point which I have in mind and which means a little differently is this: You can not set up the prices as a test of reasonableness or unreasonableness. We are speaking of a standard, and the point is—

The CHAIRMAN. You are discussing the proposition as to whether it would be feasible to put that into a statute; that is, whether the prices would be a possible test in a statute.

Mr. JENKS. Yes.

The CHAIRMAN. That is a different proposition from the one I had in mind—whether or not the officer in passing upon the matter must have that feature present in his mind all the while.

Mr. JENKS. He doubtless would need to take that into consideration as one of the prominent features.

The CHAIRMAN. You could not eliminate it.

Mr. JENKS. Certainly not in all cases.

The CHAIRMAN. I suppose we all agree on this economic proposition: That the business is conducted on perhaps two hypotheses, or involves two fundamental considerations in which the public may be said to have a legitimate interest, first, a fair return on the capital invested, and, secondly, the price that the consumer is to pay. Those are the two great factors in all great economic propositions.

Mr. JENKS. Yes, sir.

The CHAIRMAN. And outside of those we have not any legitimate interest in attempting to legislate except in connection with them;

that is, unless in some reasonable connection the legislation proposed is connected with either one of those propositions.

Mr. JENKS. It would be connected with either one of them. The question now is as to the test the Commissioner might use. Suppose we take one other case where it connects a little differently. Now, contracts are made by which a person will agree to sell only through one company—I am not passing upon the question as to whether it is reasonable or unreasonable—but in itself that is the contract, but it is not directly connected with the prices. They simply say, "If you sell to anybody else you can not have ours." The matter of prices is fixed beforehand; it is probably a retail price. Of course it goes back ultimately, perhaps, to the profits and prices which the manufacturer is going to charge, but in his immediate operation the question of prices does not come in at all.

The CHAIRMAN. That is true; I have known of a number of such cases; I have had occasion to have experience with them, and I never knew one of them that was not for the purpose of controlling the price to the consumer.

Mr. JENKS. In most cases those goods are goods with certain brands; with prices that are put on, often printed on, whatever they may happen to be, and all dealers sell at the same price. Now of course when you go back to the manufacturer he has in mind the price, and very likely it may be contrary to public policy, but you can not take the prices there as the test of whether that kind of contract is reasonable or unreasonable; you have rather to take some such condition as this—is that leading too much toward monopoly to be in the public interest? It has to be something more definite than a question of public price.

In attempting to create a new statute of this kind—because that is practically what we are proposing here—we must fit that statute into the industrial conditions of the day. We ought not to legislate out of existence a good many kinds of contracts that certainly many honest people believe to be more or less in restraint of trade and still in the public interest. So we ought to make a statute that would as far as possible cover that ground. That subject covers so great a variety of contracts that I doubt if we can get any more definite words than the words "reasonable" or "unreasonable." Moreover, reasonable or unreasonable has been construed so many times by the court, although in different connections, that it does furnish such a test as to give a pretty definite idea.

The CHAIRMAN. Then the proposition is this, that you think reasonable or unreasonable is as definite as it can properly be made, taking into consideration all of the conditions?

Mr. JENKS. I think so.

The CHAIRMAN. What if the authorities say that the introduction of that language into the statute would render this penal provision void; we simply can not apply that test.

Mr. JENKS. I take two positions there that are a little bit different from that. In the first place, I should think it quite possible that if you put a statute on the books along that line, even though you do not find that the courts have interpreted that word in just that connection, you would find that the courts would hereafter interpret that word in this new connection. The reason why the court has not interpreted that word in such a connection before is because it



has not been asked to do so under the laws as we have had them. Whenever the question has come up under the Sherman Act and the claim has been made that this contract was not in unreasonable restraint of trade, and consequently it ought not to be held void, the Supreme Court has simply waived aside that question of whether it was reasonable or unreasonable.

Now, it seems to me that one of the strong reasons that we have to believe that the court would take that word "reasonable" or "unreasonable" is that in all of these discussions there is no indication of the court thinking there was any particular difficulty in the interpretation of that word. They have simply said, "We did not discuss that because this act covered the whole question."

Mr. EMERY. You say the court could find no difficulty in the matter. You are familiar with the Trans-Missouri case. Do you not remember that in that case Justice Peckham spoke at considerable length and said that the principal effect of saying the railroads could agree upon the reasonable rate of combination would be to say that the railroad could fix their own rates?

Mr. JENKS. The point I wish to make is this, that so far as my knowledge of the matter goes—I would not have you take my opinion as an expert—but so far as my knowledge goes the court has not discussed the validity of such a use of those words. It has simply said, as regards the Sherman antitrust act, that it applied to all acts in restraint of trade, whether reasonable or unreasonable, and that as far as I recall—and I still think that you are possibly giving a little too strong emphasis to that—so far as I recall, the cases have not indicated in any way that there would be any difficulty in applying the Sherman antitrust act as between reasonable and unreasonable restraint of trade if that had been in the act.

Mr. EMERY. You realize that in that case the court had been practically asked to read that in.

The CHAIRMAN. Your idea is that if the importation of the words into this act would have had those consequences it would have been very natural for the court to call attention to one of the reasons why they would not read it in.

Mr. JENKS. Yes, sir; that is it exactly.

Mr. DAVENPORT. I would like to ask Professor Jenks when, if ever, are we to have explained to us these most astounding changes in the bill as first proposed, to wit, that after a hearing by this Commissioner, he makes an order and a criminal penalty is attached for violating it.

The CHAIRMAN. We will wait until Professor Jenks gets through with his argument and see what he says.

Mr. DAVENPORT. We were informed that Professor Jenks would come here and explain this.

The CHAIRMAN. My suggestion was that we wait until Professor Jenks gets through, and if he does not make any explanation of that I will hear you on the proposition.

Mr. DAVENPORT. We want to know what he proposes to do.

The CHAIRMAN. After he finishes his argument you may ask him any questions you like.

Mr. MARTIN. Is it not a fact that the whole purport of the amendment to the law is to exempt certain combinations and trusts from the operation of the law that are now amenable to it?

Mr. JENKS. No; I would not put it in that way. It is to permit certain persons, or any person who is willing to come under the law—any person or corporation—to do certain acts perhaps that now he could not do.

Mr. MARTIN. That will be substantially the same thing; it would be allowing them to do things by the permission of the Department or the Executive which they are not forbidden by law to do.

The CHAIRMAN. It would allow them under the provisions of this bill to engage in what was held to be a reasonable restraint of trade which they are not prohibited from doing. That is the answer to that.

Mr. MARTIN. If that is the situation; if the object of this amendment is to permit certain people to escape the penalties of the law that are now amenable, then I would like to inquire what class of corporations or trusts they are that the framers of the bill had in mind that ought to be exempted.

Mr. JENKS. There has been no specific class of combination—I will put it this way, there has been no specific individual or corporation in mind at all in framing this statute. It has been simply this, that we have thought that there were certain acts now forbidden, certain contracts, etc., now forbidden under the law that were reasonable and in the interest of the public, and ought to be permitted. We have tried to frame an act that would permit such things, but we have not had a specific corporation in mind. Not one of us has received a cent from anybody or ever will.

Mr. MARTIN. That was not the point. What I was trying to get at was this: If there are in existence now good combinations, laudable trusts, that are now subject to the pains and penalties of the law that the amendment would exempt, what I wanted to get at was whether any combinations at the present time or since the law was enacted were suffering or had suffered any punishment or penalties that were unjust and oppressive under the law.

Mr. JENKS. It was intimated here this afternoon at one time that there were some penalties inflicted that were unjust. I have not anything myself to say in criticism of the court or of anyone else.

Mr. DAVENPORT. The Standard Oil case was for violations of the interstate-commerce act, not of the antitrust act. That case was one for taking rebates.

Mr. MARTIN. If I may be permitted to say one word further, my point is that if there were any considerable class of people or class of combinations that ought to be exempted by amendment of the law that they should be permitted to know something about them or what they were. For instance, there is one element of people who complain about the enforcement of the law openly and come here publicly and seek an amendment of the law to exempt themselves, but outside of those I have heard no element of people who come here boldly and frankly and say they are oppressed by the present law and that therefore it ought to be amended.

Mr. JENKS. We have discussed that at great length, and I do not know that I need to dwell upon it any further. Some of the members of the committee and others have said that it was generally understood that many business men felt that they were very much hampered in the kind of contracts they could make, as long as they

felt they could not do what was considered reasonable merely in restraint of trade.

I think, Mr. Chairman, in regard to this question of reasonableness or unreasonableness I have nothing further to say. It has seemed to us—that is, all the persons, so far as I am aware, connected with the bill—that the courts probably would consider this language in this connection definite enough so that they could interpret and enforce the law, and would be willing to do that.

Mr. DAVENPORT. May I inquire whether you have found any case bearing directly on that?

Mr. JENKS. So far as that matter is concerned, as I said when I began, I have submitted one or two matters here that seem to me to have some bearing on that. Still, the legal end of the proposition, I suppose, was covered by Mr. Smith the other day.

The CHAIRMAN. This is everything that you have in that line, is it?

Mr. JENKS. Yes, sir; everything I have on that line.

The CHAIRMAN. Except so far as you have called attention to the authorities, they are all the authorities you have on that point?

Mr. JENKS. In the other connection, with reference to the power of the Commission being a legislative power or executive power, etc—in that connection there are various matters of reasonableness and unreasonableness that have come up that seem to me to have a somewhat similar bearing; that is, the courts seem to have a pretty clear view as to what reasonable and unreasonable mean, and a clear enough view in several cases, so that it has seemed to us that if it were applied to a statute of this kind in this connection there would be no difficulty about interpreting it.

Now, let me call attention again to the fact that the crime that we have in mind here is after all an economic act, if you please; a business act that has been under consideration by the courts for centuries, and it seems to me that under those circumstances, when we put a crime onto the—

Mr. DAVENPORT. Have you any cases that sustain you in that?

Mr. JENKS. All of these cases that you yourself have submitted with reference to restraint of trade sustain the contention. The first day I spoke here I called your attention to 25 pages of citations that bore on that matter.

Mr. DAVENPORT. There is absolutely no possible connection or analogy.

The CHAIRMAN. The long and the short of it is that Professor Jenks has no more authority.

Mr. JENKS. I have no further authorities to cite, but far better than authorities, when it comes to making a new law in a new field, is for the legislators to see what the conditions are and how they can best bring about favorable conditions among the people, and if they use words that are reasonably familiar to the courts they may expect that if the act itself has the right purpose and a bona fide purpose the court will itself find the interpretation.

Mr. EMERY. I object to the statement you make that the purpose of this law is to meet economic crimes. You remember that the law placed several times a physical obstruction to interstate commerce and large numbers of men have been indicted under it.

Mr. JENKS. I do not mean that it is necessary.

Mr. EMERY. You seem to think that you could use the words "reasonable" or "unreasonable" more reasonably—if I may use the words in that connection—with merely economic offenses that do not involve physical obstruction or physical acts that would themselves constitute crime by virtue of the economic offenses that you have dwelt upon.

Mr. JENKS. Your illustration shows again how extremely complicated this matter must be and in making different laws of necessity all cases must be covered, and also the almost infinite variety of contracts that have to be interpreted; so that along those lines we can not expect to get a word or a test that is more definite than "public policy" or "reasonable" or "unreasonable."

Mr. EMERY. Not only contracts but acts.

Mr. JENKS. In either one of those cases; yes.

I said a moment ago that if the committee thought that in the line of decisions they have now the courts had not yet interpreted those words "reasonable" or "unreasonable" in such a class of cases as these, there were two things to keep in mind; one was that if they brought before a court matter that had not existed before, I presume you could not get any more definite word, and the probability is that the court would make the interpretation; in the second place, if you can find any better expression, one that will serve the public interest, and will meet this variety of conditions, then you ought to put that better expression in instead of the word "reasonable."

Mr. DAVENPORT. Suppose they find on the contrary that just such a law as this would be held void by the courts; what would you suggest then?

Mr. JENKS. Then I suggest that they make one that would not be void, but would cover the same points.

#### **ARGUMENT OF HON. WILLIAM B. WILSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA.**

Mr. LITTLEFIELD. You were making your statement when we suspended.

Mr. WILSON. Mr. Chairman, at the time of adjournment last evening I was discussing, or had been discussing, the right of workmen to organize for their own protection, and to enter into collective bargains, and from that, as a result of questions by the chairman, had led up to a discussion of the right to organize their consuming power.

The laws of the land have invariably distinguished between a man dealing in his own product and a man dealing in the products of others. That is true in almost every State in the Union, if not all, with regard to laws relative to peddling. A man who buys and sells is required to take out a license, but the man who sells the products of his own labor is not required to take out a license in order to peddle it from house to house, or from place to place. So the laws, as they exist at the present time, and have existed, make the distinction—a very distinct difference—between the man who is dealing in his own product and the man who is dealing in the products of others, between the trader and the man who is a workman.

What is true of the products of labor would be naturally true when it comes to the case of a man purchasing for his own consumption, for consumption in his own home. Men naturally have the right to

determine what things they will purchase and what things they will not purchase for their own use, and, having that right, have the right to agree amongst themselves what things they will purchase and what things they will not purchase. Take, for instance, a case where an article is produced in accordance with the laws of the State where child labor of very tender years is employed, the laws of the State not prohibiting the employment of that child labor in that particular factory or anywhere within that State. I take it that any citizen of the United States, any citizen of that State or any other State, would have the right to refuse to purchase the product of that factory or that plant as long as child labor was employed in it; that any citizen would have the right to agree with his neighbors that they would not collectively purchase any of the product of that plant while child labor was employed. Labor might be employed within the laws of the State in which an article is produced in sweat shops, under sweat-shop conditions, and any citizen of that State, or any other State, would have a perfect right to refuse to purchase the product of that sweat shop and to agree with his neighbors not to purchase the product of that sweat shop, although it was produced completely within the limits of the law of the State in which it was produced.

Mr. LITTLEFIELD. That is, it is your idea that they would have a right to regulate the conditions of employment in that way?

Mr. WILSON. I believe that they would have the right to refuse to purchase that material because it was the product of that class of labor—that kind of labor.

Mr. LITTLEFIELD. For that purpose, and to regulate the terms of employment in that way?

Mr. WILSON. Yes; to regulate the terms of employment in that way, and that they would not be encroaching upon the right of the employer in doing so.

Mr. LITTLEFIELD. Now, Mr. Wilson, what would you say about this language used by Judge Gray when he rendered his decision in the report of the Anthracite Coal Strike Commission? He said:

Our language is the language of a free people to furnish any form of speech, by which the right of a citizen to work when he pleases, for whom he pleases, and on what terms he pleases can be successfully denied. The common sense of our people, as well as the common law, forbids that this right should be assailed with impunity.

Mr. WILSON. The statement in itself is an absurdity.

Mr. LITTLEFIELD. That is, this statement of Judge Gray's?

Mr. WILSON. Yes, sir; it is absurd; there is no man who has the right, under existing law, or who can have the right under our existing form of Government, to work when, where, and for whom he pleases.

Mr. MALBY. Why?

Mr. WILSON. I am proceeding to state why. We recognize property in real estate, and I believe justly so. We recognize property in personal effects, and I believe justly so. As long as we recognize the title of any man or any corporation to the exclusive use of any real property, there is no man who can go upon that property and work upon it without the consent of the owner. He must have his consent before he can work upon it; consequently a man can not work when, where, and for whom he pleases. He must secure somebody else's

consent, unless he is sufficiently well-to-do to be able to have real property of his own, or to secure title to it by rental.

Mr. MALBY. That does not help us much; that comparison does not help us much in this matter.

Mr. WILSON. It simply demonstrates conclusively that a man can not work when, where, and for whom he pleases.

Mr. LITTLEFIELD. That is, to your mind it does.

Mr. WILSON. Yes.

Mr. LITTLEFIELD. The judge's decision is that, to his mind, it does not have any connection with the proposition at all.

Mr. WILSON. Of course; I am simply stating what is in my mind.

Mr. LITTLEFIELD. That is, you are giving the reasons for your opinion?

Mr. WILSON. Yes; I am giving the reasons for my opinion, and I take it that I can not go out here on any of these railroad properties and go to work there without the consent of the owner; I can not go out on any of these farms adjacent to the city of Washington and work upon those farms without the consent of the owner; I can not go out into any of the mines or mills of the country and work in those mines or mills without the consent of the owner. I must have his consent first, so that I can not work when, where, and for whom I please.

Mr. MALBY. That does not elucidate the point very much to my mind.

Mr. WILSON. The other party, who is the owner of the property, must be pleased as well as I must be pleased.

Mr. MALBY. What has that to do, say, with a man's right to labor when and where he pleases, provided he can secure such labor?

Mr. WILSON. His right to work?

Mr. LITTLEFIELD. Judge Gray is very obviously referring to the interference of third parties. That is so obvious it is not worth while discussing. His proposition was that a man had a right to work where he liked without being interfered with by a third party.

Mr. MALBY. Outside interference?

Mr. WILSON. The right of a man to work when he pleases and where he pleases under our laws——

Mr. MALBY. Without interference?

Mr. WILSON. Yes—must be conceded, provided he can get some person who owns the property who will permit him to do the work.

Mr. LITTLEFIELD. Is it your conception of Judge Gray's sentiment that I read to you that he means the other thing?

Mr. WILSON. My conception of the statement is that it is absurd, and that it is a loose form of statement that is very generally used, but will not bear analysis, and has to have some additional explanation in order to make it conclusive.

Mr. LITTLEFIELD. Six other fairly intelligent people joined in that statement.

Mr. WILSON. I do not doubt that whatsoever. The entire commission joined in the statement.

Mr. LITTLEFIELD. They were Carroll D. Wright, John M. Wilson, John G. Spalding, Edgar E. Clark, Thomas H. Watkins, and Edward W. Parker; but your idea is that, notwithstanding that, it is a very gross absurdity?

Mr. WILSON. It is a very gross absurdity notwithstanding that fact, and if there had been dozens of others who had attached their signatures to it, it would not have changed my opinion of the statement itself.

Mr. LITTLEFIELD. I imagine not.

Mr. WILSON. It would have been necessary for them to have made additional explanations to their statements before they could have convinced me of the correctness of it.

Mr. MALBY. You have not any doubt as to what the court intended to apply, have you? The interpretation of the language does not bother you, does it?

Mr. WILSON. An interpretation of the language can only be made from the language itself, and if there had been, in connection with the language, a statement made by the gentlemen, it would have been more in conformity with my ideas. In other words, I do not believe that any man has any right to interfere with any other man in the exercise of his judgment as to whether or not he will accept employment from somebody else.

Mr. MALBY. That is a better statement.

Mr. LITTLEFIELD. But you do not think anybody ought to combine to interfere with the exercise of that judgment—or do you?

Mr. WILSON. I do not believe they ought to be allowed to combine to interfere with it, and in using the word “interfere” I want to qualify it by saying that he has a right to persuade, he has a right to induce by moral suasion, by argument, by reason, but he has no right to persuade by force and by threats, by show of violence or offers of violence.

Mr. LITTLEFIELD. That is, you do not think men ought to be allowed to conspire to threaten to injure?

Mr. WILSON. I do not believe they should be allowed to conspire to threaten to injure, but there may be a difference of opinion between you and me as to what a combination to conspire to threaten may be.

Mr. LITTLEFIELD. When we say “conspire to threaten,” what do we mean? What is a conspiracy to threaten?

Mr. WILSON. A conspiracy to threaten?

Mr. LITTLEFIELD. A conspiracy to threaten to injure a person. Would you be in favor of authorizing a conspiracy to threaten to injure the person or property of another?

Mr. WILSON. No; I would not.

Mr. LITTLEFIELD. You would not?

Mr. WILSON. No; I would not be in favor of it.

Mr. MALBY. How far would you go?

Mr. WILSON. How far would I go?

Mr. MALBY. You and Judge Gray are getting nearer together, now. How far would you suggest that you can go with propriety?

Mr. WILSON. I would not consider it a conspiracy on the part of workmen to combine together to refuse to accept certain wages or certain conditions of employment that might be offered to them by an employer, even though their refusal to accept those wages or the conditions offered might injure the business interests of the employer. In doing so, they would simply be protecting their own business interests. I would not consider it a conspiracy to injure, even though workmen were to combine together to refuse to purchase the prod-

uct of any given factory or plant engaged in any line of business, even though their combination to refuse to purchase the product of that plant might be an injury to the business interests of the owner of the plant.

Mr. DAVENPORT. No matter what the purpose of doing so?

Mr. WILSON. It is a well-known fact that labor organizations do not engage in combinations for the purpose of refusing to accept the wages and conditions that are offered by employers, or refusing to purchase the product of any given plant, for the purpose of injuring the employer in that given line of business. They engage in it, not for the purpose of injuring him, but for the purpose of protecting their own interests. They have the same right to refuse to accept the rates that he has offered that he has to offer those rates, and if they fail to come to an agreement it is simply a bargain that has not been consummated; that is all.

Mr. MALBY. You have the right to do everything except one thing; you have the right to refuse to purchase and buy goods as an individual, but have you the right, or do you claim the right, to combine others with you not to purchase my goods, including in that combination men who have no possible grievance against me?

Mr. WILSON. I have stated that in the beginning of my remarks; I contend that I have the right to refuse to purchase your goods.

Mr. MALBY. That is conceded.

Mr. WILSON. I contend also that I have the right to agree with my neighbor that I will not purchase your goods, even though my neighbor may have no grievance against you, if I can induce him to believe that it is to his interests to refuse, or to the interest of the community.

Mr. LITTLEFIELD. That is to say, a half a dozen of you notify Mr. B. who had no interest, that if he continued to purchase goods of the other man, you would not buy goods of him?

Mr. WILSON. I do think we have that right.

Mr. LITTLEFIELD. That is, you can injure B by depriving him of business on the hypothesis that you want to stop B from doing business with A?

Mr. WILSON. No; I contend that B has no property right in my business or patronage.

Mr. LITTLEFIELD. No; but what is your purpose in combining to deprive B of his business because he will not do what you want him to do? Is it not to injure him, and what are you taking his business away for?

Mr. WILSON. I am not taking any business away from him. We do not propose to take any business away from him; we simply propose to withhold the business from him.

Mr. LITTLEFIELD. Suppose there are ten of you, and that is all the business he has, and you agree you will not give him any business?

Mr. WILSON. He has no property right in the patronage of the ten.

Mr. LITTLEFIELD. Is it not your purpose to deprive him of his business, to injure him?

Mr. WILSON. No.

Mr. LITTLEFIELD. When the ten men are all the customers a man has, and they combine to deprive him of that custom, they do not deprive him to injure him? Is that what you mean?

Mr. WILSON. That is what I mean.



Mr. LITTLEFIELD. They do not tell B that if he will not do what they want him to they will injure him by taking it away from him? Do you think that holds water?

Mr. WILSON. Whether they tell him so or not, the purpose is not to injure B.

Mr. MALBY. Of course we might as well be frank with each other, because you and I have got to come to a conclusion about this.

Mr. WILSON. I have been talking very frankly.

Mr. MALBY. We might as well concede that the object is to injure him.

Mr. WILSON. No; the object is not to injure him.

Mr. MALBY. Because, if you did not injure him, sir, you would never come to a conclusion.

Mr. WILSON. The purpose is not to injure him. The injury to him is but an incident in the accomplishment of a purpose—that is all. The purpose is to secure terms, working terms, that are satisfactory to the employees of the original manufacturer, and the injury to B is but an incident.

Mr. LITTLEFIELD. Do you intend to accomplish that incident or do you not?

Mr. MALBY. The incident becomes at once the major premise.

Mr. WILSON. No; it is not the major premise by any means.

Mr. LITTLEFIELD. Do you intend to accomplish that incident?

Mr. WILSON. If ten agree together that they will not purchase from B, their intent must be—

Mr. LITTLEFIELD. Not to purchase from B.

Mr. WILSON (continuing). To refuse to purchase his goods; then I contend that B has no property interest in the patronage of those ten men, and having no property interest in the patronage of the ten men, he has no right to complain if they do agree.

Mr. LITTLEFIELD. Although he is injured?

Mr. WILSON. Even though he is injured.

Mr. LITTLEFIELD. And although you intend to injure him?

Mr. WILSON. No; we do not intend to injure him.

Mr. LITTLEFIELD. Now, do you not know, as a matter of fact, that it would be perfectly idle for the ten to put up any such proposition to B unless he was to be injured by them?

Mr. WILSON. As I have stated before, the injury to B is but an incident in connection with the general purpose.

Mr. MALBY. It is the entire object and purpose?

Mr. WILSON. B is purchasing goods from A; A is manufacturing goods under conditions that I believe are unjust and are wrong, and I refuse to purchase those goods. I combine with nine others of my neighbors in refusing to purchase goods from B because of the fact that B continues to purchase the goods that, in my estimation, and in the estimation of the other nine, are unjustly produced, and it therefore becomes but an incident on the part of the general purpose, or in the accomplishment of the general purpose, that B is injured.

Mr. LITTLEFIELD. Let me go a little further. Without this incident you could not make any headway, could you?

Mr. WILSON. As a matter of course, in the accomplishment of any purpose, unless the incidents connected with the accomplishment of that purpose are accomplished, the purpose itself can not be.

Mr. LITTLEFIELD. Do you not know, as a matter of common sense and common knowledge, that without these incidents you could not accomplish any result at all?

Mr. WILSON. Admitting the fact that without the accomplishment of the incidents in connection with the accomplishment of the general purpose, that the general purpose itself could not be accomplished, that does not demonstrate that any of the incidents are themselves the general purpose.

Mr. LITTLEFIELD. It demonstrates that you could not make any headway with the general purpose if you did not have the intent to injure the man in the incident. That you concede yourself.

Mr. WILSON. The injury to the man naturally follows, and the injury to the business naturally follows, but it is an incident in the accomplishment of the general purpose, and the injury comes to his business because of the fact that he is unable to secure patronage that he formerly secured, but he has no property interest in the patronage of any man whatsoever. And having no property interest in their patronage—

Mr. MALBY. I am not quite sure about that.

Mr. WILSON. You may not be, but I am.

Mr. LITTLEFIELD. What particular decision do you rely on for the conclusion you state with such confidence, because these are legal propositions?

Mr. WILSON. I acknowledge the fact that they are legal propositions, and I am not making a statement here—

Mr. MALBY. That is the reason I say I am not sure.

Mr. WILSON. I am not making a statement here on the basis that the legal decisions in the past have been along that line; on the contrary, I acknowledge the fact that the courts, particularly during the past twelve or fourteen years, have held to the contrary.

Mr. MALBY. That is what I meant.

Mr. WILSON. I am not speaking of what the courts hold, or what is existing law. If existing law was right I would not be here before the Judiciary Committee asking for amendments to the existing law. It is because of the fact that existing law, in my opinion, is incorrect that I am seeking a remedy.

Mr. LITTLEFIELD. Then when we speak of it as a matter of law, we should speak of it as the law, but you speak of what you think ought to be the law.

Mr. WILSON. I am speaking of the rights in the case and the justice of the case; not what law is or has been, but what it ought to be.

Mr. MALBY. What you mean to say is that the decisions of the courts which hold that the man's business is a property right should be changed?

Mr. WILSON. I am willing to admit that the decisions have been along that line; that good will in itself is considered a property right, and the right to patronage, and the right to the free flow of labor, are all, at the present time, recognized by our courts as rights that employers have and that dealers and traders have. I recognize that fact. I am not making the statement I am making now on the basis that existing law is along the lines I am making. I am making the statement that existing law should be changed to conform to the lines I have been suggesting.

Mr. LITTLEFIELD. Then you concede, on your hypothesis, that these combinations for this purpose are combinations to violate the law as it stands?

Mr. WILSON. I am compelled to concede that under the decisions of the Supreme Court in the Debs case, in the Loewe case, and in several other cases, that combinations of working men for the purpose of refusing to purchase any article of interstate commerce is a violation of existing law. The Supreme Court, as I understand it from the reading of the decisions—and, by the way, I do not read them from the standpoint of an attorney, because I have not had training in that line—but the decisions of the Supreme Court, as I understand them from reading them, at the present time make it a conspiracy in restraint of trade for labor organizations to combine together to refuse to purchase an article of interstate commerce, and it is because of the fact that the courts have decided along that line and that we believe it is unjust to the working men and the farmers of the country that I have introduced the measure that I have introduced (H. R. 20584). We believe it to be in the interest of the community at large that remedial legislation of that kind should be secured.

The original purpose, as I take it, of the so-called Sherman anti-trust law was to prevent combinations in restraint of trade that resulted in taking exorbitant profits out of the people. Labor organizations are not organizations for profit; they have no capital stock, declare no dividends. Not being organizations for profit, then they could not possibly be a conspiracy in restraint of trade for the purpose of extorting exorbitant profits out of the people. In addition to that, the working people of the country and the farmers of the country combined constitute the great bulk of the people. It would be practically impossible for the wage-workers as a whole, and the farmers as a whole, to so combine that they would injuriously restrain trade to any perceptible extent.

Mr. MALBY. What interest do you think the farmer has in this proposition?

Mr. WILSON. They have considerable interest in this proposition. They have an interest in this proposition because of the fact that purchasing agents of great trusts and combinations go out into the farming regions, or have been going out into the farming regions and buying up their cattle, their cotton, and their corn, naming the price at which the farmer must sell, if he sells at all, and then taking that product and putting it on the market in its finished state and practically naming the rates which the consumer must pay to secure the product. Farmers have organized, particularly in the West, for the purpose of protecting themselves against the purchasing agents of those great corporations, so that they may be able to secure a portion of the fair market price of the products of the farm. Under the decisions of the Supreme Court in several cases, those organizations of farmers, organized for a good purpose, organized for the purpose of protecting themselves against the unfair encroachment of the power of the purchasing agents for the trusts or the combinations, are prohibited from organizing for that purpose, and they have a special interest in legislation of this kind, seeking to remove their organizations from the operation of the Sherman antitrust law.

Mr. MALBY. Now, Mr. Wilson, to be perfectly frank with you, I know of no such corporation. Do you know of any such corporation which is engaged in that kind of business?

Mr. WILSON. In purchasing cattle?

Mr. MALBY. Yes; whose business is to purchase cattle for the purpose which you mention. Do you know of any such firm? I do not know of any myself.

Mr. STEBBINS. Excuse me just a moment. One of the allegations in the bill in equity that was filed by the Government against Swift recently was that the agents had combined to keep down the price of cattle, and they did it in various ways. They would put up the price of cattle at Kansas City, and the farmers would rush a lot of cattle there, and they would say that they would not buy any more, and the farmers would have to sell out at a lower rate. That was alleged to have been done again and again to the detriment of the farmers.

Mr. MALBY. Was that proved? Was anything of that kind proved?

Mr. STEBBINS. I think it would have been if the case had ever come to trial. I do not know whether they took any evidence or not.

Mr. LITTLEFIELD. It would have been proved if they could have proved it.

Mr. STEBBINS. I do not think the Attorney-General would have made any such allegation without evidence to establish it.

Mr. MALBY. I thought maybe Mr. Wilson had somebody in mind.

Mr. LITTLEFIELD. That does not necessarily follow, that the Attorney-General would not have made the allegation if there had not been evidence.

Mr. WILSON. I do not assert of my own knowledge that any such combination exists, and I believe it would be difficult for anyone to demonstrate that such combination exists, and that is one of the difficulties in the situation at the present time. Half a dozen men may sit in the city of Chicago and determine the buying and the selling price of beef, and yet it would be a difficult proposition to demonstrate that that is the case, because none of the six men could be placed upon the stand in connection with it. Six or eight men can sit in the city of New York and determine the selling price of anthracite coal, and yet it would be a difficult proposition to be able to demonstrate to a court of law that those six or eight men did sit there and determine what the selling price of anthracite coal should be. But when it comes to a question of millions of farmers and millions of working men undertaking to determine what they will do, it is an easy proposition to get evidence. The one is protected by the smallness of their numbers, and the others do their work open and above board, and it makes a very different proposition. And because of the fact that it is necessary that there should be these combinations of farmers and wageworkers to protect themselves, not merely against illegal combinations, but to protect themselves from combinations that are recognized by law, we believe that this remedial legislation should be given. The law itself recognizes the right of capital to combine. There are several corporations organized under Federal laws, and there are multitudes of them that are organized under our various State laws, and everyone of those corporations is simply an organization of capital, and being recognized by law, can act without coming under any regulations relative to conspiracy.

Now, Mr. Chairman, I have expressed, to some extent, my reasons why I believe this amendment which I have presented should be

passed. I want to suggest, however, before yielding the floor, that a slight amendment should be attached to the end of what is known as "section 9." In looking over the bill since it has been presented, I fear that complications might arise out of the construction of the last sentence in that amendment, and I believe the words "as such" should be added to that clause.

Mr. LITTLEFIELD. That is, to your bill?

Mr. WILSON. In my bill, that the words "as such" should be added, so that when members of labor organizations were exempt from the operations of the Sherman antitrust law, it would only be as such members of labor organizations that they would be exempt, and under no other circumstances.

Mr. LITTLEFIELD. That is, if they got out into any other vocation, the same men, you would hold them?

Mr. WILSON. Certainly.

Mr. LITTLEFIELD. That is, you would exempt them where they are operating in one capacity, and hold them in another?

Mr. WILSON. I would exempt them while members of labor organizations.

Mr. LITTLEFIELD. But if they operated in any other capacity you would hold them?

Mr. WILSON. Certainly; if they were operating in trade to bring them within the Sherman antitrust law. Men frequently are liable in one instance and innocent of criminal intent in another.

Mr. LITTLEFIELD. Producing the same result?

Mr. WILSON. No; the results are entirely different.

Mr. DAVENPORT. Mr. Wilson, I would like to ask you a question. The right of a man to buy from another or to sell to another is entirely his absolute right, is it not? For instance, supposing there are half a dozen bakers in my town, and I go to one of them and I say, "What is the price of a loaf of bread?" He answers, "Ten cents." "Well here is 10 cents; I want a loaf." He has a perfect right to ask me if I belong to the church, and upon my informing him that I am not a member of the church and do not intend to become one, he has a perfect right to refuse to sell to me, has he not?

Mr. WILSON. I do not know what the decisions are.

Mr. LITTLEFIELD. He has the absolute right. Mr. Wilson does not undertake to be a lawyer, and he has gone over this thing pretty thoroughly, and with all due respect to Mr. Wilson, I doubt very much if he could illuminate the committee on the legal proposition; he does not undertake to.

Mr. WILSON. No; I do not undertake to.

Mr. DAVENPORT. What I wanted to call his attention to was a radical vice in his position. Suppose there are half a dozen bakers in my town. I can go to one and offer to buy bread of him, and he can refuse to sell to me for any reason, as, for instance, that "You do not belong to the church." I go to the next one and he has a perfect right to do the same thing, and so with all the six of them. But have those men the right to combine together and refuse to sell me bread unless I join the church? As I understand it, that combination is an illegal and criminal conspiracy at common law, a combination to oppress. You recognize that the right on the part of the sellers to combine not to sell for a certain purpose and the right of men to combine not to buy for the same purpose are subject to the same limitations?

Mr. WILSON. I make a marked distinction between the man who is buying and selling in trade and the man who is buying for the use of his own home, just the same as the laws make a decided distinction at the present time between the man who is buying and selling in trade and the man who is selling the products of his own labor. The laws at the present time make a decided distinction between those two classes.

Mr. LITTLEFIELD. It is not quite correct to make that statement with reference to monopolies, because the law does not happen to make any such distinction.

Mr. WILSON. There can be no monopoly, in the natural order of events, where millions are involved on the one side and but a handful on the other.

Mr. LITTLEFIELD. That may be true, but the law does not create that distinction.

Mr. WILSON. We are asking that it shall create it.

Mr. LITTLEFIELD. You inadvertently stated it was the law, but you meant that it is your idea that it should be the law?

Mr. WILSON. Exactly; that the law give us the conditions we are asking for.

Mr. LITTLEFIELD. You are not stating what the law is, but what you want the law to be?

Mr. WILSON. Yes, sir; that is what I stated to begin with, and that has been my statement throughout.

#### **ARGUMENT OF DANIEL DAVENPORT, ESQ., OF BRIDGEPORT, CONN.**

Mr. DAVENPORT. I maintain that equality before the law and that laws to be valid must operate equally on all are principles fundamental to our institutions. As bearing upon that proposition, I want to cite a short extract from the opinion of Mr. Justice Field, the opinion of the court in Cummings against the State of Missouri, in fourth Wallace, 321.

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that *in the protection of these rights all are equal before the law*. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined.

Now, upon the proposition that the power delegated to the Commissioner by this proposed bill is legislative power, and that the bill would be unconstitutional on that account, I want to cite three or four cases. The first I call the attention of the committee to is that of *Anderson v. Manchester Fire Assurance Co.* (59 Minn., 182). The law of Minnesota provided:

The insurance commissioner shall prepare and file in his office on or before the 1st day of August, A. D. 1889, a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements, or conditions as may be indorsed thereon, or added thereto, and form a part of such contract or policy, and such form when so filed shall be known and designated as the Minnesota Standard Policy. Said insurance commissioner shall within sixty days from the passage of this act prepare, approve, and adopt a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements, and conditions as may be indorsed thereon or added thereto and

form a part of such contract or policy, and such form shall, as near as the same can be made applicable, conform to the type and form of the New York Standard Fire Insurance Policy, so called and known. \* \* \*

The insurance commissioner may call upon the attorney-general for such assistance as to him may seem necessary in the preparation of the aforesaid standard insurance policy, and it is hereby made the duty of said attorney-general to perform such service.

That law was, by the supreme court of Minnesota, held to be a delegation of legislative power, and, being a delegation of legislative power, it was void for that reason.

Mr. MALBY. When was that decision rendered?

Mr. DAVENPORT. This decision was rendered in 1896.

Mr. LITTLEFIELD. Can you quote a brief extract giving the reasons the court laid down, or have you some other case that is more concise?

Mr. DAVENPORT. I will give you the cases, and then I will read a few extracts from one of them.

Mr. LITTLEFIELD. Read the most salient.

Mr. DAVENPORT. A similar statute was under examination before the supreme court of Wisconsin in the case of *Dowling et al. v. The Lancashire Insurance Company* (92 Wis., 63).

Mr. LITTLEFIELD. What date?

Mr. DAVENPORT. In 1896. Commencing on page 68, the court said:

That no part of the legislative power can be delegated by the legislature to any other department of the government, executive or judicial, is a fundamental principle in constitutional law, essential to the integrity and maintenance of the system of government established by the constitution. The difficulty experienced by courts in distinguishing between legislative power, which can not be delegated, and discretionary powers of an executive or administrative character, which may be intrusted to other departments or officers in the conduct of public affairs, has been frequently experienced and acknowledged; and it arises, in a great measure, from the fact that powers of the most important character, not essentially legislative but which the legislature might properly, in the first instance, exercise or determine by its own judgment, are frequently devolved by the legislature upon other departments, officers, or bodies. \* \* \*

Where an act is clothed with all the forms of law and is complete in and of itself it may be provided that it shall become operative only upon some certain act or event, or, in like manner, that its operation shall be suspended; and the fact of such act or event, in either case, may be made to depend upon the ascertainment of it by some other department, body, or officer, which is essentially an administrative act. In all such cases it is upon the occurrence of the fact or event that the act becomes operative or its suspension is accomplished. In *Locke's appeal* (72 Pa. Stat., 491, 498) it was declared that "to assert that a law is less than a law because it is made to depend upon a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed or to things future or impossible to know;" and it was said that the proper distinction is this: "The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action to depend." And accordingly the time when the act shall take effect may be made to depend upon the majority of a popular vote being cast in its favor under a submission to the electors for that purpose, provided in the act. *State ex rel. Attorney-General v. O'Neill* (24 Wis., 149); *Smith v. Janesville* (26 Wis., 291).

In considering the true test as to whether a power is strictly legislative, or whether it is administrative and merely relates to the execution of the law, *Ranney, J., in Cincinnati, W. & Z. R. Co. v. Clinton County Commissioners* (1 Ohio Stat., 88), said: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done. To the latter no valid objection can be made." Substantially the same conclusion was reached in *Field v. Clark* (143 U. S., 650, 681-694)——

The CHAIRMAN. That is the customs case?

Mr. DAVENPORT. Yes. [Continuing:]

in respect to the provisions of the tariff of October 1, 1890 (26 U. S. Stats., 612, ch. 1244, sec. 3), in respect to reciprocity of commerce, by which authority was conferred upon the President to suspend by proclamation the free introduction of sugar, molasses, coffee, tea, and hides when satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States which he might deem reciprocally unequal or unreasonable, and it was held that this provision was not open to the objection that it was an unconstitutional transfer of legislative power to the President. The reasoning of the court in this case goes upon the ground that, upon a proper construction of the act, it provided for the ascertainment of an event or state of affairs in view of which the provision for reciprocity of trade should cease to exist.

The application of the distinction so well established and clearly pointed out in these cases is, we think, decisive of the validity of the act in question. Its object was to provide for a uniform policy of fire insurance, to be made and issued by all companies taking such risks, so that no other than the standard policy, prepared, approved, and adopted by the insurance commissioner, could be lawfully issued or used within the State. Indeed, to issue or deliver any other than the standard policy was made a misdemeanor and punishable by a fine. *Bourgeois v. N. W. Nat. Ins. Co.* (86 Wis., 609). Although the act provided for "a printed form in blank of a contract or policy of fire insurance, together with such provisions," etc., it provides also that they were to form a part of such contract or policy so that the essential substance of the contract required to be embraced in such form should have the sanction, force, and effect of a legal enactment; and, as applicable to the present case, the stipulations of such policy would operate, under the act, to change the law as it had previously existed in relation to parole waiver of forfeitures by the conditions of fire-insurance policies. The act, in our judgment, wholly fails to provide definitely and clearly what the standard policy should contain, so that it could be put in use as a uniform policy required to take the place of all others, without the determination of the insurance commissioner in respect to matters involving the exercise of a legislative discretion that could not be delegated, and without which the act could not possibly be put in use as an act in conformity to which all fire-insurance policies were required to be issued.

\* \* \* \* \*

Within the lines indicated a discretion was reposed in the commissioner as to the form of the policy which embodied the substance of the contract and which was to have the sanction and force of law.

Mr. LITTLEFIELD. That is, the substance of that case apparently is that it was for the legislature to define and establish the terms and that they had no power to delegate to any individual the power to define and establish those terms. Is that it?

Mr. DAVENPORT. Yes; that is the point, and in the case of *O'Neil et al. v. Insurance Co.* (166 Pa. St., 72), decided in 1894, the court said:

The act of April 16, 1891 (P. L., 22, entitled "An act to provide for a uniform contract or policy of insurance to be made and issued by all insurance companies taking fire risks on property within the State," and directing the insurance commissioner to prescribe a standard policy of insurance, and forbidding the use of any other, is unconstitutional, inasmuch as it involves an unauthorized delegation of legislative power. It seems that the legislature may itself prescribe a form of contract of insurance.

Now, I take it that the doctrine of these cases is correct. Applying this proposition to the proposed bill, of course, in it the President of the United States is directed to prescribe certain future rules and regulations which are to govern the matter in futuro and upon which rules is to depend the question whether parties shall thereafter be immune from prosecution or not; and in the second place the bill in effect provides that upon the future decision of the



Commissioner of Corporations that any given arrangement, contract, or combination submitted in his judgment or discretion is not unreasonable, that party is thereafter not to be prosecuted for acts done thereunder. Now, I say that in principle these matters are intrinsically legislative in their nature, and the delegation of the power and duty to the President and Commissioner is unconstitutional and void.

Mr. MALBY. Now, I wanted to call your attention to a case recently decided by the court of appeals of the State of New York as to how far legislative power can be delegated to a commissioner. Have you examined that case?

Mr. DAVENPORT. The Saratoga Water Company?

Mr. MALBY. The Saratoga Gas case.

Mr. DAVENPORT. Yes; I have examined the report that I found in the appellate division of the supreme court, but I could not find any action on it by the court of appeals. But the point there is that there is sufficient in the act itself to supply the standard. By the act the commissioners might determine what the charges should be.

Mr. LITTLEFIELD. On the basis of the standard laid down in the act?

Mr. DAVENPORT. In the act, that case is, of course, applicable upon the other point of objection to the proposed bill, viz, as to whether or not in declaring a person a criminal for making a combination in unreasonable restraint of trade, without defining the standard of unreasonableness, the proposed bill is not void of uncertainty. As I understand that particular case, as in some other cases that I heretofore cited, the legislature, it was there held, had put into the act the standard by which the question was to be determined.

Mr. MALBY. You know the court of appeals reversed the supreme court in that case?

Mr. LITTLEFIELD. Has that opinion been published?

Mr. MALBY. I have not seen it.

Mr. DAVENPORT. I could not find it down in the library.

Mr. MALBY. I know it has been reversed.

Mr. LITTLEFIELD. On what grounds, do you remember?

Mr. MALBY. On the ground that the legislature had no constitutional power to delegate its powers, chiefly. If you get the dissenting opinion of the New York supreme court you will find substantially the opinion of the court of appeals.

#### STATEMENT OF MR. SAMUEL GOMPERS.

Mr. LITTLEFIELD. To what points did you wish to address yourself?

Mr. GOMPERS. To two or three points, and especially the one under discussion, as to the labor organizations under the bill as drawn. My understanding of it is that after the labor organizations have registered and filed their charter and constitution, the names and addresses of the principal officers and the address of the principal office, they are not required to file any agreements or contracts.

Mr. EMERY. Later.

Mr. GOMPERS. They are not required to file agreements or contracts. My understanding is that if they do, they are subject to the disapproval of the Commissioner of Corporations.

Mr. LITTLEFIELD. That is, in order to get immunity, they are not required to file agreements or contracts. That is your understanding?

Mr. GOMPERS. Yes, sir; they are not required to file their agreements and contracts to secure the immunity provided in the act.

Mr. EMERY. You mean all the immunity?

Mr. GOMPERS. That is my understanding of it.

Mr. EMERY. That is included in sections 10 and 11?

Mr. GOMPERS. Yes; that is my understanding of it. I want just to call attention to the fact that as one of the representatives of the labor organizations who have appeared before the committee, I have stated that we desired the clear distinction made as between the organizations that have capital stock and are organized for profit, the organizations of the men who deal in products of labor and the distribution of those products, and the other associations of men and women who own and control no wealth, who are organized not for profit, those associations which have no capital stock, and whose only object in association is the protection of themselves, their lives, their labor power. That distinction should be clearly and distinctively drawn; and I said that our position is, that in so far as the bill applies to the corporations and associations and common carriers, the associations and corporations that deal in the products of labor and distribute the products of labor, the bill is necessary. And so far I am in hearty accord with its purpose. In so far as it refers to the labor organizations which you refer to as associations not for profit, and without capital stock, I ask that those features be entirely eliminated from the bill, and the amendments which I submitted to the committee take the place of them, throughout.

May I, as concisely as I can, make the statement that I ought to make in order that those who are opposed to us may clearly understand our attitude?

Mr. LITTLEFIELD. That is, to clearly state your position?

Mr. GOMPERS. Yes. So far as the bill is concerned, that is our position, and we desire the elimination of all references to the registration of voluntary associations not for profit nor owning capital stock, and we desire that the amendments which I submitted to the committee may be accepted in lieu thereof.

Mr. Washburn, a member of the committee, asked Professor Jenks a question as to what his view would be as to the insertion of the word "unreasonable" in the existing antitrust law.

Mr. EMERY. At what point?

Mr. GOMPERS. In so far as the agreements and so-called restraints of trade are concerned. Answering for myself in regard to that, the bill as drawn may be suitable to the corporations for profit and owning capital stock. It is unsuitable to the labor organizations, for this reason, if for no other, that you immediately establish compulsory arbitration. The decision of the United States Supreme Court held that the labor organizations come under the provisions of the Sherman antitrust act. If, then, the contracts and agreements and the activities of the labor organizations are subject to the review of either the Commissioner of Corporations or the courts as to the reasonableness or the unreasonableness of an agreement, the matter assumes immediately the position of compulsory arbitration. The Commissioner determines the reasonableness or unreasonableness of an agreement with employers, and finally becomes the arbiter of what the conditions shall be.

Mr. DAVENPORT. May I interrupt you by asking you a question?

Mr. GOMPERS. You will not interrupt me at all.

Mr. DAVENPORT. Would you be in favor of this bill as it stands, or would you be opposed to it?

Mr. GOMPERS. The insistence of labor is for the amendment proposed.

Mr. LITTLEFIELD. Without that amendment do you favor or oppose the legislation?

Mr. GOMPERS. The legislation? No, sir; I am in favor of the legislation, particularly as it applies to the corporation and common carrier.

Mr. LITTLEFIELD. Yes; but are you in favor of it without the suggestions you make?

Mr. GOMPERS. I am not in position to make definite answer as to that.

Mr. LITTLEFIELD. Then you would not want to say, as a hard-and-fast proposition, whether if your suggestions are not adopted you should be in favor of the adoption of the legislation?

Mr. GOMPERS. I should be opposed to the review of contracts and agreements of laborers.

Mr. LITTLEFIELD. Yes; that phase of the bill, so far as it affects labor organizations, you are opposed to.

Mr. GOMPERS. Yes.

Mr. EMERY. May I ask you a question?

Mr. GOMPERS. Yes, Mr. Emery.

Mr. EMERY. Inasmuch as there has been considerable discussion and considerable information cheerfully given about the various authors of the various sections of the bill, may we ask if there is any section in the existing bill which is either the result of your own personal suggestion, or which was drafted by yourself or by counsel for you?

Mr. GOMPERS. Others and myself participated in the conferences at which this bill was drafted. In so far as the questions of registration and the immunities of corporations for profit and owning capital stock are concerned, I gave little or no attention to them. I was willing that the gentlemen who were particularly interested in securing the purpose for which they were having conferences should draft their own desires. But so far as labor is concerned, the insistence was made before the committee for the amendments substantially for which we ask this committee, and I am free to say that the discussion has made that more clear to my mind.

Mr. EMERY. Is there any provision in the existing bill, either expressed in your own language or in that of your counsel, conveying your thoughts?

Mr. GOMPERS. Yes.

Mr. EMERY. May I ask which one it is?

Mr. GOMPERS. This referring to the associations not for profit and without capital stock.

Mr. EMERY. This is section 9?

Mr. GOMPERS. My first suggestion to the committee was a direct, affirmative, explicit exclusion of the organizations of working men and women from the operations of the antitrust law. I did not participate and did not have a chance or opportunity, being busy, to participate in all the conferences, and several drafts were made and revised drafts and improvements. I will say this, that I can not give

my consent to the passage of a bill that will make the agreements of the organizations of working men and women subject to review by the Commissioner of Corporations.

Mr. LITTLEFIELD. And inasmuch as you do not get any immunity under this bill unless you do, you are therefore opposed to the passage of this bill so far as it relates to the organizations of labor?

Mr. GOMPERS. Yes, sir; we would sooner take our chances before the courts and our chances of getting the legislation which we want. We are not opposed to the bill in so far as it relates to corporations for profit and owning capital stock. I want the business men of this country to feel absolutely assured, beyond peradventure, that they may conduct business, and not have the presumption against them that they are violating the law.

A number of gentlemen have been asked specific questions as to employers' organizations or employers who have combined and whose acts are either legal or illegal. I know that there are a number of associations of employers whose very constitution and by-laws and mutual agreements are secret—secret because they apprehend that their actions, that their associations, are in violation of existing law. I know that. You may ask me "Will you specify one," and I must say "You must excuse me; I can not; I will not." I would not violate the confidence that has been reposed in me. But that it is true, if my word is worth anything, I pledge my word of honor. As I say, I am in hearty accord with the purposes of the bill, to secure for the merchants and for the manufacturers, the employers of labor and the common carriers, the justice to which they are entitled in order that they may carry on modern business, and within the law.

Mr. LITTLEFIELD. But so far as it relates to your organization, you are opposed to it?

Mr. GOMPERS. I am opposed to the review, if that is the understanding of the bill; that is, that the agreement of the organizations of working men and women, either among themselves or with employers, are subject to review and to disapproval. I am opposed to those features of it.

Mr. LITTLEFIELD. That is the genesis of the whole thing. If there is any legislation on this line that is affirmative in connection with labor organizations, you favor the amendments you have suggested.

Mr. GOMPERS. Yes; and those are the views not only of myself, but of the members of the executive council of the American Federation of Labor, who have discussed this thing thoroughly, both by correspondence and in conference for over two and a half days and nights, and also in a great conference, held in this city last month, of the representatives, the responsible officers, of the great trades unions of America, when these amendments that I have submitted were considered.

Mr. LITTLEFIELD. I do not see how there can be any objection to the fact; you practically speak for the labor organizations? You have authority to do so?

Mr. GOMPERS. Yes; and I am instructed to do so.

Mr. LITTLEFIELD. So far as it is possible to get an expression from them, and as broad as it can be gotten within the time, you have the authority to take this attitude as representing them?

Mr. GOMPERS. Yes, sir; and there were two days and evenings given to that conference to which I refer.

Mr. LITTLEFIELD. I understand that there was thorough consideration.

Mr. GOMPERS. It was formulated in the protest which, with others, I had the honor of presenting to Vice-President Fairbanks and to the Hon. Joseph G. Cannon, the Speaker of the House, and both of these gentlemen presented these protests and they were printed in the Record.

Just a word further. I wanted to discuss these questions of the strike in connection with interstate trade and commerce, but time does not admit of that. But the chairman asked me some direct questions on last Saturday in regard to the boycott and my position upon it, and I think I gave laconic, direct answers.

Mr. LITTLEFIELD. Perfectly.

Mr. GOMPERS. I was not questioned further on that subject, perhaps because I was so direct. I should have been pleased had I been questioned further upon that subject, because I have some views upon that which are not generally accepted, and I would like to present them.

Mr. LITTLEFIELD. I think you pretty thoroughly covered the whole ground, although you may proceed further if you want to.

Mr. GOMPERS. Just for a moment, if I may. Mr. Jenks spoke of the boycott, and I am greatly appreciative of his insistence that there must be some differentiation between boycotts and the maintenance of the right of the primary boycott, that is the right for men to say that they will not deal with a certain person, with a certain business man; that they have the right to withhold their patronage from him. They objected, as many do, and as the Anthracite Coal Strike Commission declared. I want to present just a thought or two upon that subject. May I say that I do not believe that I would intentionally hurt any man or woman, or child, or beast, or reptile, only in self-defense. I say that so that you may understand that I am not one of those men who run amuck, and aim to hurt and injure. I know this, that never in my whole life, my private life, or in connection with the labor movement, has any act of mine been governed and controlled or initiated from motives of malice, or the personal feeling entered into it. I believe in the boycott. I believe in the right of the boycott. After all, what is the boycott, not in the sense in which some people construe it, of personal attack, of unlawful threats, of intimidation of a character that is unlawful and improper? But the threat to do a certain thing is perfectly proper to indulge in if the doing of the thing itself is not improper nor unlawful. I hold that no man has any vested right in my patronage or the patronage of any other man, and when I speak of the boycott I speak of it exclusively in the sense of the bestowal or the withholding of patronage. No man has any vested right in the patronage of another. If no man has a vested right in my patronage or the patronage of another I have the right to withhold it, and the others have the right to withhold it, and if they have the right to withhold it they have the right to threaten to withhold it. A man has the right to threaten to do what he has a right to do.

The term "boycott" has become distorted out of all consideration of its real meaning and purpose, even in the Loewe case. I said Saturday, and I want to repeat now, that I would not disrespectfully utter one word against our Supreme Court, either its men, the court itself,

or its decisions and its opinions. I have a right to my own opinion. I have a right to differ; I have a right to criticise, to express my own opinion. There are conceptions as to the rights of men to-day that were wholly different in time gone by. The conceptions of the rights of men will be broader as time goes on. The strike was not always legal, even perhaps by indirection, but as a matter of fact our opponents sometimes even academically concede to the workmen the right to strike, but that was not always legal. At one time it was a criminal act, punishable by imprisonment, by branding, by hanging. A different concept has come over the minds of people as time went on, and it will so continue. The workingmen of to-day are, generally speaking, in the enjoyment of greater rights than they had twenty, fifty, or one hundred or more years back. The decision of the Supreme Court of the United States has thrown them back. It has shorn from them rights which we believed were ours. But Supreme Court decisions have been changed and modified, and I am in hopes; I am optimistic. I not only hope, but I firmly believe—I am firmly persuaded and convinced that the normal activities of the working people of our country are going to be accorded to them, and to be regarded as absolutely normal and right. There is no purpose in the labor organizations either to destroy industry or commerce, not even of one man. The actions of the organizations of labor, of the men of labor, are for the purpose of coming to an agreement with the employer; not to destroy his business, but to withhold their labor power, or withhold their patronage sufficiently to make the impress upon his mind that it is wiser, that it is better, not only for him but for the workmen and for all the people, to come to a mutual understanding and agreement for the greater and better production of wealth; that light and happiness may enter into the homes and lives of the working people and all the people. It is a mistake to believe that our purposes are different.

Mr. DAVENPORT. When you speak of normal activity, you include in that the boycott?

Mr. GOMPERS. I do, sir, in the sense in which I have used it.

Mr. DAVENPORT. That is, you do not make any distinction between what is called the primary and secondary boycott?

Mr. GOMPERS. Not so far as the law is concerned.

Mr. DAVENPORT. There is not in principle any distinction in law between the primary and secondary boycott?

Mr. GOMPERS. There is not.

Mr. DAVENPORT. I say, according to your view there is none?

Mr. GOMPERS. Yes, sir; there ought to be none.

Mr. DAVENPORT. There ought to be none?

Mr. GOMPERS. Yes.

Mr. DAVENPORT. I have read a great many of your editorials and they have always frankly taken that position.

Mr. GOMPERS. Yes.

Mr. DAVENPORT. Now, what do you say about the black list?

Mr. GOMPERS. Since you are so ardent a reader of what I write, have you found a word of what I said in adverse criticism of the Supreme Court of the United States decision upon that question?

Mr. DAVENPORT. The Supreme Court has given no decision against the black list.

Mr. GOMPERS. The Supreme Court has taken the position in the Adair case——

Mr. DAVENPORT. Oh, no; not at all.

Mr. GOMPERS. Wait a moment. The court has taken this position, if my understanding is correct, that the employer can discharge or dispense with the services of an employee for any reason or for no reason at all.

Mr. DAVENPORT. Yes; and the men can quit.

Mr. GOMPERS. We are not discussing the strike, now; we are discussing the black list. If the employer can discharge an employee or any number of employees for any reason or for no reason at all, is not the only inference this—that that reason that he may discharge them is because they are objectionable to some employer? Is not that true?

Mr. DAVENPORT. No.

Mr. GOMPERS. Is not that for any reason?

Mr. DAVENPORT. He may discharge a person for any reason, but he may not combine with another person to deprive that person of employment.

Mr. GOMPERS. Does the court say that?

Mr. DAVENPORT. They said it, necessarily, in the Adair case and in the Loewe case this winter; necessarily.

I want to call your attention to another thing. You objected to the use of the word "reasonable" there as suggested by Mr. Washburn. Is there not another very convincing reason in your mind, that if those words were put in there it would not help the organizations of labor at all, so far as the boycott is concerned, because the Supreme Court has held that the boycott is not only forbidden by the Sherman antitrust act, but is unlawful at common law?

Mr. GOMPERS. I understand you to say that there is no such thing as common law in the United States—Federal common law?

Mr. DAVENPORT. It seems that I have got to have a little controversy on that subject with the chairman.

Mr. LITTLEFIELD. Do not stop to discuss that particular thing now. Confine yourself to this matter between yourself and Mr. Gompers. I will hear you later on that.

Mr. DAVENPORT. Another thing; if this act is passed as it is now worded, have you any doubt that it would, so far as the Sherman antitrust act is concerned, permit a black list, not of an individual alone, but an agreement between employers not to employ anybody?

Mr. GOMPERS. I think so.

Mr. DAVENPORT. It would be legalized by this?

Mr. GOMPERS. I do not know that it would be legalized, but it would be, in terms.

Mr. DAVENPORT. It would bring out from under the act such a performance. As to whether it would not have the effect of possibly legalizing is another proposition. And the same is true, according to your understanding of it, on the other side, that it would remove what is called the boycott from the operation of this law, is it not?

Mr. GOMPERS. Yes.

Mr. DAVENPORT. For the same reason that it would permit employers to blacklist, it would permit employees to boycott?

Mr. GOMPERS. I think not.

Mr. DAVENPORT. You can see a difference in the two, then?

Mr. GOMPERS. I think not.

Mr. JENKS. May I record an answer that I did not give before? I was asked a question with reference to the filing of contracts of labor organizations. I hesitated in answering, because I wanted to look a moment further at the latter section and see what the immunities were. I would like to say, in answer to a question, that I think the position is this—I should so interpret the bill—that labor organizations, in the case of a contract which they might make with one another in reference to these matters, are at liberty to file that contract if they wish to do so. If they do not file the contract they will have all the immunities excepting those of sections 10 and 11, and those immunities mean, primarily, that they can not be mulcted in triple damages, for example, and they will have the immunity in regard to the time in which suit can be brought, and so on, if this act is passed. But if they do not file with the Commissioner of Corporations, they would not, of course, get his ruling as to reasonableness or unreasonableness. And let me say still further that, at the time the matter was under discussion, Mr. Gompers made the same statement as he has made here, that they did not wish any such ruling, and consequently they would practically never file their contracts.

Mr. LITTLEFIELD. I understand now his organizations are positively opposed to that part of the bill.

Mr. JENKS. Yes. Under those circumstances that was the thought, that if they wanted that ruling they could put in their contract; but we did not expect that they would. At the same time we did not think that they, as well as all others, should have the immunity of the escape from triple damages, for example, in case this passed, and that the time in which they should be subject to attack should be the same as for all other people, and there should be no distinction.

Mr. LITTLEFIELD. Of course.

Mr. JENKS. And so far as the other part is concerned, the corporations themselves, when they register must file the contracts which are primarily their contracts of organization, and that is the intent.

Mr. ALEXANDER. If they fail to register their contracts, then they remain under the six original sections of the antitrust act?

Mr. JENKS. If they fail to register any contract, that contract would be so interpreted, as I understand it. So far as that contract is concerned, the point would be just as it is now; if it is in restraint of trade, they would still be under the Sherman antitrust act.

Mr. LITTLEFIELD. And they prefer to take their chance rather than to give their assent to this legislation or come under its provisions?

Mr. GOMPERS. My understanding was that the draft of the bill provided merely that so far as labor organizations were concerned, they were to register, and furnish a copy of the charter and the addresses of their officers, and so forth.

Mr. ALEXANDER. And that would take them out from under the six original sections of the Sherman antitrust act?

Mr. GOMPERS. Yes.

Mr. ALEXANDER. You learn now that that does not do that?

Mr. GOMPERS. I am not quite so sure that that interpretation is correct. I think, without having the opportunity at this time to examine into sections 10 and 11, I will not take issue with Professor



Jenks upon that. But if, after the examination of those sections, I find that he is right, I shall then find it necessary, representing the people I do, to have the amendment which I submitted here introduced, to ask some Member of Congress to introduce it as a separate bill.

Mr. LITTLEFIELD. As at present advised, your organizations do not favor the features of this bill that relate to that?

Mr. GOMPERS. As stated in the course of the discussion?

Mr. ALEXANDER. As stated by one of the framers of the bill, Mr. Jenks?

Mr. GOMPERS. Yes; and as to the bill to which I gave my assent, it was understood that it was given tentatively, and subject to such action as myself and my colleagues might find necessary in regard to any part of the bill.

Mr. LITTLEFIELD. Yes; and what you have stated here is the result of a conference of two and a half days, subsequent to the conference you had in drawing the bill?

Mr. GOMPERS. Not entirely. It was not in completed form as presented by Mr. Hepburn.

Mr. LITTLEFIELD. When you last saw it?

Mr. GOMPERS. Yes.

Mr. LITTLEFIELD. What you have stated here is the result of the conferences of the last two or three days?

Mr. GOMPERS. No, sir; oh, of several weeks.

Mr. LITTLEFIELD. Then you have discussed it pretty fully?

Mr. GOMPERS. Yes.

Mr. LITTLEFIELD. Now, as to the contention, it seems to me the only purpose of getting now your legal views, Professor Jenks, would be so that they might be met and answered by the gentlemen opposing the legislation. Mr. Low and Mr. Jenks are anxious to have, between now and the next hearing, the objections to the bill, and it seems to me they could be put in concrete shape, in writing.

Mr. JENKS. Of course, we should be very glad if Mr. Davenport has anything of that kind that he can submit to us, but I think, after all, when it comes to the discussion of the points he wishes to make in objection to the bill, that it is extremely desirable that those who favor the bill should be here, and Mr. Low can not be here and I can not be here to-morrow. I think it would be much wiser to have Mr. Davenport not appear before the committee when we are not here.

Mr. LITTLEFIELD. My idea was that Mr. Davenport might put in brief form his points and submit in typewritten shape his principal criticisms. Of course, this would not preclude Mr. Davenport from discussing the thing fully orally in the presence of the committee. I do not know whether matters could be facilitated in that way at all.

Mr. DAVENPORT. I want to present my views in opposition to this bill to this committee, and I would like to have the gentlemen who favor it here when I do so.

Mr. LITTLEFIELD. What understanding would you like to have about how the discussion shall begin next Thursday a week? Would you like to have it begin with a statement by Mr. Davenport?

Mr. JENKS. If it is agreeable to Mr. Davenport; yes.

Mr. DAVENPORT. That is agreeable to me.

**STATEMENT OF MR. GEORGE F. MONAHAN, OF DETROIT, MICH.**

Mr. MONAHAN. Mr. Chairman and gentlemen, I desire simply to be recorded as being here representing the National Founders' Association. The organization itself comprises some 500 firms and industries located in the various parts of the United States, and employs in various capacities considerably over a quarter of a million of men. We feel very seriously on the subject of this measure, and, although I came prepared with a brief and ready to discuss the legal features of the matter somewhat at length, I believe my mission may be at least partially completed at this time, if further time is not afforded a week from now for further discussion of this matter, by stating in brief the proposition involved. Believing as we do that the Loewe decision, recently rendered by the Supreme Court of the United States, is in consonance with what the law should be, and that the law, as it now is under the Sherman antitrust act, in so far as it relates to labor unions, is just precisely what is necessary, we emphatically protest before this committee against any modification of that law, such as is contemplated in this act. We believe as to the gentlemen who have spoken in reference to this matter and their desire to still continue the opposition that they feel against the boycott, that their desire was not to diminish the force of this bill so far as the boycott is concerned. We believe that their opposition in that regard, though not well taken under the verbiage which they have asked, is sincere. We believe, however, that the bill as it is, is a substantial modification of the law as it is, and that it will afford to labor rights which labor should not have, particularly with reference to the so-called secondary boycott.

It may be, Mr. Chairman, that opportunity will not be afforded for me to be present at a subsequent meeting of this committee. If not, I desire an opportunity at least to file a brief of the law which I conceive to be applicable to the subject-matter, and also, if the committee please, and it is possible for me to be present, I do not want to have this considered to be my full discussion of the subject.

Mr. LITTLEFIELD. We will be glad to hear you later if you can be present, and if you can not, you may file a brief. The committee will stand adjourned until a week from next Thursday.

(At 6.15 o'clock p. m. the subcommittee adjourned.)

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COMMITTEE ON THE JUDICIARY,  
HOUSE OF REPRESENTATIVES,  
*Thursday, April 16, 1908.*

The subcommittee met at 10.30 o'clock a. m., Hon. Charles E. Littlefield (chairman) presiding.

Mr. LITTLEFIELD. Mr. Low, I am the only member of the subcommittee present, although there are two or three other members of the Judiciary Committee here, and if you would like to go on before the other two members of the subcommittee come in, it is quite agreeable to me, because the stenographer is here.

I had my attention called this morning to an intimation in the newspapers that the committee was not likely to report anything in

connection with this particular pending legislation. I have no authority to make any statement for any member of the committee, but it may be proper for me to say that such a report has no authority so far as I am concerned, because I have not expressed any opinion to anybody, or said anything as to what course I might take in relation to that, and I want all people who are interested in it to feel that they are going to be heard without being embarrassed by the matter being foreclosed one way or the other. I do not think that the suggestion was made, as it came out in the newspapers, with any intention perhaps of creating that impression, but such a suggestion does not do justice to the committee, and is, so far as I am concerned, without any authority whatever, and I think I speak for all the other members of the subcommittee and also for the members of the Judiciary Committee.

Mr. Low has called my attention to the fact that upon further reflection they are inclined to make some suggestions by way of amendment to the bill that is now pending, and I have suggested, that being the case, that it might be well for him to make those suggestions now so that those who are opposed to the bill may make such amendments as they like. Some of their criticisms may perhaps be answered by the suggestions that Mr. Low wishes to make by way of amendment, and I did not know but what it would shorten up the discussion, possibly, for the suggestions to be made now.

Mr. MEAD. You will recollect, Mr. Chairman, that the hearing which is being held to-day was originally to have been held last Monday. I represent the Merchants' Association of New York. Our representatives had made arrangements to come at that time. When the date was changed they came, with some inconvenience, and I think we would like to know how the time will be apportioned for the hearing.

Mr. LITTLEFIELD. If Mr. Low will first suggest what changes he wishes to propose, then I will take up the matter of the order in which the various gentlemen are to address the committee. Mr. Davenport was to have been the first to be heard this morning, but if it is agreeable to Mr. Davenport, Mr. Towne can be heard first.

Mr. Low. Mr. Chairman, I would like to read and place upon the record at this time a letter which I have received from Mr. Carnegie.

Mr. LITTLEFIELD. That reminds me that I have quite a large amount of correspondence in regard to this legislation. I will not take up the time of the committee with the reading of these protests or objections, but I will see that they all go into the record, if that is agreeable to all of you.

Mr. Low. Yes. This letter is as follows:

NEW YORK, April 13, 1908.

DEAR MR. LOW: In compliance with your request, I put in writing the views I expressed to you.

That corporations doing interstate traffic as common carriers must be controlled is granted. The Interstate Commerce Commission is the valuable result.

The railroads must be allowed to make common rates to common points, etc., because there is little difference in cost between moving loaded and empty cars—60 passengers in a car cost no more to transport than 6; 60 freight trains passing per day cost little more than 6, difference being only cost of labor and cars; the railroad itself and its organization is already provided. Hence railroad rates would be demoralized without common rates to common points. This is obvious. Therefore, these must be permitted, but the chief and almost sole duty of the Commission remains, which is to insure for the public the benefits of competition. This must never be infringed; therefore,

the Commission must possess and exercise sole authority over these common rates and be certain that they do not exceed rates generally prevailing in other parts of the country served by railways. Nor should there be rates which yield undue profits to the railroads. They should only yield what average traffic does on railroads generally. It is much the same with steel rails under present conditions. The railway companies are the only customers, and each company divides its orders among the mills which give it traffic. It is quite proper, therefore, that the railroad company and the manufacturers should be allowed to agree upon a common rate, but I do not recall any other article of which this can be so clearly said.

Within the domain of commercial restraint of trade, there should be similar authority somewhere to permit restraint needed to protect the public interest, and to deny the right to restrain when it deprives the public of the benefit of competition, which is its right. A body like the Interstate Commerce Commission can perform this duty much better than courts of law. It is vital that the Commission should win or enjoy the confidence of both the corporations and the public and become our industrial supreme court.

The Commission should regard every application for the right to combine or to agree to common prices as something wholly exceptional and against public policy. Its necessity or advisability should be, therefore, clearly proven or the privilege denied.

I can not too strongly advise against there being more than one authority to pass upon such questions, and that should be the Interstate Commerce Commission. If common carriers be placed under one commission and industrial interstate commerce under the Bureau of Corporations, or another commission, there must arise invidious comparisons between the two. Such comparisons will be publicly made. The party denied by the one will be disposed to feel that the other takes more liberal views, and vice versa, and vent his disappointment. Imagine two Supreme Courts. The standing of both courts would be lowered. No reason why the Interstate Commerce Commission should not deal with the whole subject, and every reason why it should. Its members will get a wider view of the whole question in its different phases. It is really one question, not two. We have seen, for instance, that the steel-rail question is much upon a par with the common-carrier question, both being exceptional.

One point seems to me essential—without it little general progress can be made—viz, when new combinations are proposed, the first question must always be, "What is the object sought?" In ninety-nine cases out of a hundred it will undoubtedly be to rob the community of its right to the benefits of free competition, disguise it as we may; therefore, the Commission's duty is to obtain satisfactory proof that the application is to cover an exceptional case. The conditions must be peculiar, as those of common carriers and steel-rail agreement are. If not, the application should be denied. If granted, then measures must be taken to safeguard and insure to consumers the results that competition would bring. Nothing should prevent this. That the combination be reasonable is not sufficient. It should be proved that exceptional treatment is advisable or necessary, and therefore unreasonable to deny it. Only combinations advisable or necessary in the interest of the public should be permitted, and this legal tribunals are not possessed of the knowledge or experience needed to determine. The Interstate Commerce Commission, dealing with nothing but such questions, will soon acquire experience for traditions and precedents, which will gradually harden into a system which, judiciously applied, with the making from time to time of new precedents as new problems arise, will soon give it in all industrial matters the position which the Supreme Court has won and so justly deserves in matters of law.

We are doing pioneer work just now, work that this vast union must do sooner or later, but the history of the Supreme Court should lead us to press forward now. The Interstate Commerce Commission has already made a much better start than the Supreme Court did.

Yours, truly,

ANDREW CARNEGIE.

I have read this letter, Mr. Chairman, because it is the testimony of a man of exceptionally wide business experience, who is so situated at the moment as to be substantially indifferent to what is done, and what I wish to say on behalf of those who presented the bill is that we are quite ready to propose amendments which would transfer from the Bureau of Corporations to the Interstate Commerce Commission

the functions proposed to be discharged by the Commissioner of Corporations, with the approval of the Secretary of Commerce and Labor.

Mr. LITTLEFIELD. Perhaps you might prepare and give to me what suggestions you have in the way of amendments, beginning with your first section and going through the bill.

Mr. Low. I am hardly prepared to do that this morning, Mr. Chairman.

Mr. LITTLEFIELD. Then the only one you wish to suggest now is the change from the Commissioner of Corporations to the Interstate Commerce Commission?

Mr. Low. From the Commissioner of Corporations to the Interstate Commerce Commission.

Mr. STERLING. Did I understand you to say that you had consulted the Secretary of Commerce and Labor in regard to that, and that it met his approval?

Mr. Low. No, sir; the bill as drawn gives this duty to the Commissioner of Corporations, subject to the approval of the Secretary of Commerce and Labor, and my suggestion was that instead of leaving the functions to that Department, they should be transferred to the Interstate Commerce Commission; and we are also quite ready to provide an appeal to the court, if it can be done. At the next session, whether we meet on Saturday or next week, I hope I will be able to present the detailed suggestions.

Mr. LITTLEFIELD. That is, you will make the concrete suggestions?

Mr. Low. Yes.

Mr. LITTLEFIELD. In such legislative language as you think will accomplish the result?

Mr. Low. That would cover the points that have been suggested outside of this room, to their knowledge. In the first place, I suppose that the Commission would make the regulations, and the judgment exercised would be that of seven men instead of that of one man, and if there is an appeal to the court it also takes away anything savoring of an arbitrary measure in the proceedings under the bill. I am very glad to have the opportunity of making this statement now, because I think it will appeal to everyone here. Those who have introduced this bill desire to make it, just as far as possible, in the public interest, and when those who are objecting to it make known their objections, we may see other directions in which we will be glad to propose amendments to the bill.

Mr. LITTLEFIELD. You have practically the right of way this morning, Mr. Davenport, but, if you are prepared to give way to Mr. Towne in order that he may make his statement before you begin, it is agreeable to the committee. Mr. Towne represents the Merchants' Association.

Mr. DAVENPORT. That is agreeable to me.

Mr. LITTLEFIELD. How long would you like to occupy, Mr. Towne?

Mr. TOWNE. About thirty minutes, I should think.

Mr. LITTLEFIELD. Is that agreeable to you, Mr. Davenport?

Mr. DAVENPORT. Entirely, if I can follow Mr. Towne.

Mr. LITTLEFIELD. Of course, other gentlemen who may be here to be heard in opposition to the bill will be heard after Mr. Davenport and Mr. Emery are heard, unless there are others to be heard. I think you all understand the arrangement.

**STATEMENT OF MR. A. B. GARRETSON, PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS.**

The CHAIRMAN. Mr. Garretson, give us your full name and address.

Mr. GARRETSON. A. B. Garretson, Cedar Rapids, Iowa; president of the Order of Railway Conductors. I appear here also on behalf of the other independent railroad brotherhoods.

I have no desire to appear before you in the sense of dealing with the technique of the law in this case. I am not a lawyer myself nor a representative of the law. There are certain general principles connected with it in regard to which I desire to present to the committee the views of the men of the crafts that I represent. Those men are as a class law-abiding men. The mission of our organization, in common with other labor unions with which I am familiar, teaches men respect of law, although it is asserted that the influence of those organizations lead in the reverse direction.

The decisions which have already been made under the Sherman Act have brought men who desire to be law-abiding citizens into a peculiar situation. While we believed for very many years that the terms of that act had no bearing upon men placed as we were, that is members of labor unions, it has developed of late that it has control of our acts embodied in it as well as the acts of others. In times when there is a tendency toward lawlessness anything that tends to breed disrespect for law in the minds of large bodies of men is a thing to avoid; and when men have grown up with the idea that they have certain inherent rights—in other words, the right of self protection—and it is demonstrated to them that a law deprives them of that right, you take away one of the strongest forces that govern men—the sense of fealty to law—and array against it the sense of self-interest.

We believe it desirable that measures should be taken by law to relieve men from any such situation as this, that will permit a man to exercise the rights and privileges that for centuries he has possessed, without rendering the man in the estimation of himself and others a possible criminal or lawbreaker. We believe that whatever rights we may have that are and have been generally acknowledged both by the public and by the courts should be continued to us, and that those same rights should be extended to others.

I want to say to you that these organizations believe in the original intent, as they understand it, of the restraining legislation known as the Sherman law. They believe in proper regulation and supervision of combinations of any character, but they do not believe in either the throttling or the unreasonable restriction of the effort on the part of modern men to adjust themselves to modern development, whether it be commercial, industrial, or otherwise.

We, of the railway service, stand in possibly a little different relation to many of these questions to what the wage-workers in other respects do, because we become subject to a class of legislation that does not apply to others. There has grown up now interstate-commerce legislation, and we being an integral part in the handling of interstate commerce, it has been made apparent, to the public at least if not fully to ourselves, that investigation, supervision, and publicity are a part of our fate, whether we desire it or not. Therefore we are reasonably willing to accept for ourselves the same condition of supervision and of regulation that our employers or

other commercial bodies are subjected to under the act. We favor the original act in that it provides for reasonable regulation and for the punishment of illegitimate combination. On the other hand, we favor the amendment to the law as here presented in the sense that it makes possible legitimate combination. We are not sticklers over what might or might not be decided to be a legitimate object or reasonable restraint of trade. We hold something of the view that it will always depend in a degree upon the tribunal which determines, and upon the character of men forming the tribunal. The idea involved in it is precisely the same, I suppose, as under the old English trial procedure. If you contrast Jeffries and Sir Matthew Hale on what constituted treason you will find that among modern estimates even greater divergence of opinion exists as to what will constitute reasonable and unreasonable restraint of trade.

The CHAIRMAN. What, in your judgment, is reasonable conspiracy against trade?

Mr. GARRETSON. I am, as I disclaimed a moment ago, not one of the men who is going to pass upon the restraint of trade, except in its remote sense.

The CHAIRMAN. So you fall down upon the conundrum?

Mr. GARRETSON. Better men than I have fallen down on that before me, and I suppose far better men than I will fall down that follow me.

The CHAIRMAN. Yes.

Mr. DAVENPORT. Are you laboring under the misapprehension that under the laws of the United States, passed by Congress, laboring men are not permitted to form unions?

Mr. GARRETSON. I am laboring under the idea that in the face of the law as it has been interpreted it will be thoroughly possible to forbid or to make it a misdemeanor for nothing worse than a combination or combinations of laboring men.

Mr. DAVENPORT. Are you aware that there are statutes of the United States, passed since the Sherman Act, which expressly permit labor unions to incorporate or to act without incorporation? All they are required to do under this decision is that they shall not be guilty of offenses with which they were charged in that case. Have you any idea that the laws of the United States need amendment so as to permit labor unions to organize and to become incorporated or not? You have but to look at the statutes of the United States permitting that.

Mr. GARRETSON. I do not look at statutes. I hire a lawyer. And I can get as diverse opinions upon the subject as I will pay for.

Mr. DAVENPORT. I refer to the act permitting labor unions to incorporate.

The CHAIRMAN. I do not suppose you will intimate that might be a good reason for enacting law because you could get different opinions, because the law now before us would be subject to the same unfortunate criticism.

Mr. GARRETSON. The fact is that concerning the opinions I get I suppose my fate is like those of other men who pay for opinions. It is nothing uncommon to get two opinions that are directly the reverse of each other; and, as far as the incorporation idea is concerned, I will say to the gentleman that we are one organization, possibly, present, who has been both incorporated and unincorporated. Our organization at one time was an incorporated one; to-day it is an un-

incorporated and purely voluntary association. The thing that we believe is this: Aside from the personal fear I have or the men that I am associated with may have, a condition that hampers a legitimate activity or bars a legitimate activity is, in our opinion, wrong.

The CHAIRMAN. Do you think that the activities held by the court under the Sherman antitrust act to be unlawful, are legitimate activities?

Mr. GARRETSON. As far as that is concerned, I believe that any law, or any decision under it, that in anyway deprives the laboring man—I speak from only one standpoint—of what is virtually his inherent right is undesirable and is an invasion of the laboring man's privileges and his rights; and I believe the tendency of such decisions is to invade those rights.

The CHAIRMAN. Are you in favor of the boycott?

Mr. GARRETSON. I want to say this to you: The boycott can not appeal to the members I represent, in the personal sense.

The CHAIRMAN. But are you in favor of it?

Mr. GARRETSON. Will you allow me to explain why my personal predilection or the predilection of my men may be dormant upon that subject. Our labor produces no given thing. We are only a method of interchange. Railway men do not produce; they transport. Consequently the boycott can not appeal to us like it can to the men who are engaged in a producing trade. It does not furnish us a weapon.

The CHAIRMAN. Do you think other employees ought to be allowed to engage in or promote a boycott?

Mr. GARRETSON. It not being a point of interest, I have not any very decided opinion on that subject.

The CHAIRMAN. Would you advise this committee to recommend any legislation that would authorize an interstate boycott?

Mr. GARRETSON. I will neither advise this committee to favor it or disfavor it.

The CHAIRMAN. If this committee was of the opinion that a section in this bill clearly did authorize an interstate boycott, would you urge the committee to report such a bill?

Mr. GARRETSON. I do not believe that there is a line in it that does that.

The CHAIRMAN. That is not quite an answer to the question. If the committee are of the opinion that there is a provision in this bill that does authorize an interstate boycott, assuming now that they are of that opinion, would you urge the committee under those circumstances to report the bill and thus authorize the interstate boycott?

Mr. GARRETSON. As far as that is concerned I am just as I answered a moment ago. I would leave this committee to exercise its judgment without a recommendation either way. If they believe that it is proper and that it is wise, I would say to them, follow your own judgment.

The CHAIRMAN. That covers the whole ground.

Mr. GARRETSON. We are perfectly ready to accept for ourselves those conditions that are named in the proposed amendment to the Sherman Act, because we ask for ourselves no exemption, no unreasonable exemption, from the terms that others are subjected to.

The CHAIRMAN. Then, if other people are prohibited from entering into contracts to restrain interstate trade, you do not want to be authorized to restrain interstate trade?



Mr. GARRETSON. If other people are restrained from it, we, in common with them, object to being subject to those restrictions; but we object as strongly for them as for ourselves.

The CHAIRMAN. But if under the terms of legislation other people should be prohibited from restraining interstate trade, you do not want to be excepted from the operation of the rule?

Mr. GARRETSON. No; nor excepted from the right to criticise the judgment of the legislators.

The CHAIRMAN. That is perfectly proper.

Mr. Low. I would like to ask Mr. Garretson if I am not right in believing that among the ranks of labor there is a very great fear as to whether the right to form unions, the right to combine, the right to strike, and the right to make trade agreements is not endangered under the Sherman law as it stands?

Mr. GARRETSON. That feeling is almost absolutely universal among the men that I represent. Here is a condition that I come in contact with in business circles, as well as in labor circles: Our dealings lie altogether with the managing officials of railway companies, men who are as thoroughly masters of their business as any on the continent, men who receive the highest wage on account of such ability that is paid in the country. Those men are as badly at sea as we ourselves as to what does or does not place them in violation of the law, if the law in regard to combinations applies alike to them and to us. It deprives the country of the strongest agency in existence to-day which has to do with industrial and commercial unrest, and that is the ability of the combination of companies on the one side and the combination of organizations on the other to dispose of questions that threaten to interrupt the traffic of the country.

For instance, here is a condition that has been existing in the city of Washington for the past three weeks, that fully illustrates our relative conditions under an application of the Sherman antitrust act, where many people believed that both the companies and ourselves were violating that law, and yet the purpose that was served was beneficent. I believe no man will deny that. A wage reduction was threatened in certain territory, and it covered one of the industrial subdivisions of these United States. You are aware that the Government makes up wage statistics by geographical divisions—

The CHAIRMAN. That is, alleged statistics.

Mr. GARRETSON. Well, that is the name they are published under. At any rate these subdivisions exist for the purpose named. They are not alleged subdivisions.

The CHAIRMAN. You are right about that.

Mr. GARRETSON. The question involved that entire territory. It was dealt with collectively by a large number of railway managements and of organizations.

The CHAIRMAN. Did you meet under the act of Congress passed since the Sherman Act?

Mr. GARRETSON. The fact is it was not dealt with collectively by virtue of that act at all. That act applied to one organization or to many. That act did not justify us meeting together, and it was only by common agreement that we dealt with it for the entire body. The result that was reached was that friendly relations were continued, business was not interrupted, nor the public confidence destroyed by

an industrial dispute vast in its nature. But still, under the opinions that have been handed down, there is no doubt in the minds of many that both the companies and ourselves were subject to punishment under the terms of the law in question.

Now, for our friends the enemy; they are reputable, upright men; they are good citizens of this country. For the man on our own side of the table, I believe we are fairly reputable citizens. There is not a man of us that has ever been in the police court; but still it is not a desirable situation to place men in from either standpoint, that they are doing an act with a good intent that lays them amenable to the law for a violation of the law, and if it is within the power of the present Congress to do away with that condition, I believe it is desirable for all concerned that it should be done.

Mr. Low. Am I not right in believing that if that controversy to which you refer to in that particular territory had not been amicably settled by such agreement, that it would probably have disorganized business all over the United States—the railroad business—because the railroads involved in that controversy had such connections of their own that it would have gone everywhere?

Mr. GARRETSON. I say to you that there is no question of what it would have done; it would have interrupted traffic on one-quarter of the continent, if not more.

Mr. MALBY. You have not quite stated that agreement so that I can understand it. What was the agreement made?

Mr. GARRETSON. Will you make your question plainer? I did not quite understand it.

Mr. MALBY. You say you entered into an agreement which stopped the dispute. What sort of an agreement was it?

Mr. GARRETSON. It was simply an agreement made through the intermediaries, under the act which has been referred to.

Mr. MALBY. An agreement to do what?

Mr. GARRETSON. That the railway companies should withdraw a notice of reduction in wage. In other words, a conclusion was reached.

The CHAIRMAN. And that was under the provisions of a Federal statute now in existence?

Mr. GARRETSON. It was.

The CHAIRMAN. Now, what would have been the action that would have paralyzed industries if an agreement had not been reached? What were the men going to do to induce these tremendous results?

Mr. GARRETSON. The men were going to retire from the service of the company.

The CHAIRMAN. Without any combination to restrain trade?

Mr. GARRETSON. That is a question.

The CHAIRMAN. Were you proposing to enter into a conspiracy to stop interstate trade, and to retire, as a method of carrying out your conspiracy?

Mr. GARRETSON. If the fact of their combining comes under the language of "for other purposes."

The CHAIRMAN. Were the men proposing to enter into a conspiracy, or an agreement, to put it in milder form, to paralyze interstate trade and traffic so far as they were concerned, and then strike for the purpose of carrying out that agreement? Was that what they were proposing to do; did they have that in contemplation?

Mr. GARRETSON. They were not going to strike or retire from service for the purpose of carrying out an agreement; they were going to strike for the purpose of stopping a wage reduction.

The CHAIRMAN. That is, they were not going to have any combination with other roads? The men on this particular road were going to leave their employment?

Mr. GARRETSON. You have a mistaken idea; there were at least twelve roads represented.

The CHAIRMAN. Were they in the southern section?

Mr. GARRETSON. In the southeast.

The CHAIRMAN. But the men would go out on those roads without being in combination with the men of other roads, and then take their chances?

Mr. GARRETSON. In each and every instance those were independent corporate properties, with no connections.

The CHAIRMAN. If the men saw fit to strike under those circumstances, without any preliminary understanding, they had a perfectly legal right to do it under existing law.

Mr. GARRETSON. What constitutes a preliminary agreement?

The CHAIRMAN. Don't you know what an agreement is?

Mr. GARRETSON. I know what an agreement is; but when it comes to a preliminary agreement, I am not so sure.

The CHAIRMAN. An agreement is an agreement between two or more persons, and a preliminary agreement would be the thing to which it is preliminary.

Mr. GARRETSON. There were more than two or more persons.

The CHAIRMAN. That is just exactly the legal situation. Your men had a right to strike if they did so without any kind of preliminary agreement, an agreement being an agreement between two or more persons, because one person can not agree, but two can, and more than two; and a preliminary agreement is an agreement preliminary to the thing to which it relates. Do I make that plain?

Mr. GARRETSON. You do.

The CHAIRMAN. That is exactly the situation.

Mr. GARRETSON. On the other hand, if that is true, it is equally a conspiracy between two independent members of our own organization when they agree to do a thing.

The CHAIRMAN. That depends altogether on circumstances.

Mr. STERLING. Mr. Chairman, I would like to ask you a question. Would an agreement among the men of these twelve roads be a violation of law?

The CHAIRMAN. A preliminary agreement for the purpose of controlling the operations of those roads in that territory would be an agreement in restraint of interstate commerce, and a strike in pursuance of such agreement would unquestionably be unlawful.

Mr. STERLING. Suppose all the men operating those 12 roads appointed committees, and those committees knew and understood that the men of the roads were not getting the wages they desired, and the committees knew the men would follow their advice. They get together and consult and present a proposition to the twelve roads for more wages, saying: "If you don't pay them we will strike." The roads do not concede their demands and they strike. Is that a violation of the law?

The CHAIRMAN. Well, that would depend on whether the facts established under your hypothesis showed a combination or agreement.

Mr. STERLING. Supposing they combined that far—suppose that was the limit of the combination?

The CHAIRMAN. I think the chances are it might be. A strike independent of a preliminary agreement beyond all question is authorized and lawful. I can not go any further than to say that is my own opinion. A strike which is the result of a combination or agreement, in restraint of interstate trade and commerce is an unlawful strike, because it is a part of the carrying out of an unlawful agreement or combination.

Mr. STERLING. It may have the result of restraining trade and commerce, but their purpose is more wages.

The CHAIRMAN. But the original agreement, as a result of which the strike takes place, must be an agreement or contract in restraint of commerce.

Mr. STERLING. Supposing their only purpose is to urge their demand for higher wages? And in urging their demand for higher wages they find it necessary to work together?

The CHAIRMAN. The fact that their original purpose is to increase their wages does not relieve the contract or agreement under these statutes of its unlawful character.

Mr. STERLING. I do not agree with you about that.

Mr. CAULFIELD. I suggest that we go ahead with the hearing.

Mr. LOW. I would like to ask the committee now to hear Mr. Marburg.

#### ASSOCIATIONS REPRESENTED BY MR. EMERY.

National Association of Manufacturers.  
 Citizens' Industrial Association of America, and affiliated branches.  
 International Association of Master House Painters and Decorators of the United States and Canada, 16 Union square, Somerville, Mass.  
 Merchant Tailors' National Protective Association, New York, 241 Fifth avenue.  
 National Association of Box Manufacturers, 431 West Main street, Louisville, Ky.  
 National Association of Master Bakers, Chicago, Ill., 315 Dearborn street.  
 National Confectioners' Association, St. Louis.  
 National Erectors' Association.  
 National Slack Coeprage Manufacturers' Association.  
 National Team Owners' Association.  
 National Association of Automobile Manufacturers.  
 Association of Master Plumbers, St. Louis, Mo.  
 Baltimore Metal Trades Association.  
 Battle Creek Industrial Association.  
 Board of Trade, Camden, N. J.  
 Boston Typothetae.  
 Builders' Exchange of Baltimore City.  
 Builders' Exchange, Pittston, Pa.  
 Business Men's Association, Ithaca, N. Y.  
 Business Men's Club of Frankfort, Ky.  
 Business Men's League of Rock Springs, Wyo.  
 Building Trade Employers' Association of New York City.  
 Chicago Brass Manufacturers' Association, 1110 Schiller Building.  
 Chicago Lighting Fixture Association.  
 Citizens' Alliance of Beloit, Wis., 222 Goodwin Block.  
 Citizens' Alliance, Fremont, Ohio.  
 Citizens' Alliance of Grand Rapids, Michigan Trust Building.  
 Citizens' Alliance, Houston, Texas, 206½ Main street.  
 Citizens' Alliance of Portland, Oreg., 226 Sherlock Building.  
 Citizens' Alliance of Saginaw, Mich., 603 Bearing Building.

Citizens' Alliance of San Francisco, Merchants' Exchange Building.  
 Citizens' Industrial Association of St. Louis, 1005 Chemical Building.  
 Citizens' Industrial Association of Toledo, 567 Spitzer Building.  
 Clarksville Tobacco Board of Trade.  
 Commercial Club of Spokane, Wash.  
 Contracting Bricklayers' Association, Cincinnati.  
 Electrical Contractors' Association of Texas.  
 Employers' Association of Buffalo, N. Y.  
 Employers' Association, Chicago, Ill., Marquette Building.  
 Employers' Association of Cleveland.  
 Employers' Association, Columbus, Ind.  
 Employers' Association, Indianapolis, Ind.  
 Employers' Association, Kansas City, Mo.  
 Employers' Association of Marion, Ohio.  
 Employers' Association of Massachusetts, 88 Broad street, Boston, Mass.  
 Employers' Association, Quincy, Ill., 111 North Fourth street.  
 Employers' Association, Springfield, Mass., 19 East Court street.  
 Employers' Association of the Building Trades of the District of Columbia, Washington, D. C.  
 Employers' League of Auburn, N. Y.  
 Erie Business Men's Exchange, Erie, Pa.  
 Fort Dodge Commercial Club, Fort Dodge, Iowa.  
 Founders and Employers' Association, Los Angeles, Cal.  
 Fox River Valley Manufacturers' Association, Aurora, Ill.  
 Georgia Industrial Association, Toccoa, Ga.  
 Houston Manufacturers' Association.  
 Illinois Lumber Dealers' Association, Chicago, Ill.  
 Indiana Retail Lumber Dealers' Association, Indianapolis, Ind.  
 Indianapolis Employers' Association, 618 State Life Building.  
 Kansas State Retail Merchants' Association.  
 Lynn Shoe Manufacturers' Association (Incorporated).  
 Manufacturers' Association of the City of Bridgeport, 411 Court Exchange Building.  
 Manufacturers' Association of Indiana, Commercial Club Building, Indianapolis.  
 Manufacturers' Association of New York, 198 Montague street, Brooklyn, N. Y.  
 Manufacturers' Association of the Northwest, Portland, Oreg.  
 Manufacturers' Club, Cincinnati, Ohio.  
 Manufacturers and Merchants' Association, Kansas City, Mo.  
 Manufacturers and Producers' Association, Knoxville, Tenn.  
 Massachusetts Association of Heating and Ventilating Engineers and Contractors, 826 Exchange Building, Boston, Mass.  
 Master Builders' Association of Allegheny County, Pittsburg.  
 Master Builders' Association of Boston.  
 Memphis Industrial League.  
 Merchants' Association of Catskill, N. Y.  
 Merchants and Manufacturers' Association of Los Angeles.  
 Merchant Tailors' National Exchange.  
 Metal Manufacturers' Association, Philadelphia, 1001 Chestnut street.  
 Missouri Manufacturers' Association, St. Louis.  
 New York Team Owners' Association.  
 Ohio State Association of Builders' Exchanges, Cleveland.  
 Palo Alto Citizens' Alliance.  
 Printers' Board of Trade of New England.  
 St. Louis Furniture Board of Trade.  
 Shipowners' Association of the Pacific Coast, San Francisco.  
 Springfield Branch, National Metal Trades Association.  
 Syracuse Metal Trades Association, 517 Kirk Block.  
 Western Painters' Association, Denver, Colo.  
 Wholesale Grocers' Association of the District of Columbia.  
 Wichita Commercial Club.  
 Worcester Builders' Exchange.

**ARGUMENT OF MR. JAMES A. EMERY.**

Mr. EMERY. Mr. Chairman, when, with your indulgence, I was permitted to suspend last Saturday, I was attempting to call to the attention of the committee, in direct relation to the so-called Wilson amendment to the Sherman antitrust act, in answer to the contention made by Mr. Gompers and the representatives or organized labor generally, that there is no reasonable ground for asserting that it was the intention of the framers of the Sherman antitrust act to exclude from its operation combinations of labor, but that, on the contrary, the suggestion to except them was made only with reference to the original Sherman bill, which never became a law, and which bore only an historical relation to the existing act, inasmuch as the bill as it was originally proposed was merely the first form in which the general question was raised and discussed, did not become a law, and could only be considered in all the various shapes which it took, as so many expressions of the attempt to meet the combination evil then believed to exist. But all forms of the bill were, as a matter of record, rejected, and the whole matter turned over to the Judiciary Committee of the Senate, which drew the existing act, and inasmuch as Senator Edmunds, the then chairman of the Judiciary Committee, was vigorously opposed to any exception of combinations of labor from the act, and as he is generally credited with having been the chief influence in the construction of the present act, and as he asserted on the floor that they should not be exempted from it, and afterwards declared in public interviews that they were not, it seems to me reasonable to say that it was the intention of the framers of the act to meet the existing evil as a whole, taking no chances of raising any dubious constitutional questions by attempting to exempt any one class from the operation of the act. Subsequently I have attempted to call your attention to the fact that where the Sherman law has been construed by the courts of the United States every right for which organized labor contends before this committee that can justly be conceded, either as a matter of privilege or as a matter of right, has been not only recognized, but approved by the courts of the United States, and there is nothing in the decisions, as they now stand, that gives just cause for declaring that the right to make collective bargains, the right to form combinations of labor for lawful purposes, the right to quit work in concert, except for the purpose of injuring another maliciously, or for the purpose of deliberately tying up the interstate commerce of the country, has been judicially questioned.

I desire now to call the attention of the committee, if I may, to the most recent amendment that has been suggested to section 3 of the existing bill. Section 3 reads:

Nothing in said act approved July second, eighteen hundred and ninety, or in this act is intended, nor shall any provision thereof hereafter be enforced, so as to interfere with or to restrict any right of employees to strike for any cause.

Instead of the words "for any cause" there has been substituted in the Senate bill, and it is also suggested that there be inserted in the House bill, the words "for any purpose not unlawful at common law." I wanted to call your attention, Mr. Chairman, in the first place, to the fact that the authorities which Judge Davenport has

cited here to show the absolute necessity in a criminal provision for certain and definite language, that clearly defines an act to be avoided before a penal section will receive the enforcement of the courts, applies to just such language.

Mr. LITTLEFIELD. That is, the courts will not sustain an act of criminal legislation that is indefinite and uncertain?

Mr. EMERY. Exactly, sir. It has been said again and again that laws which create crime should be explicit, that all men subject to them may know what acts it is their duty to avoid.

Mr. DAVENPORT. You would not limit that to criminal proceedings?

Mr. EMERY. Penal.

Mr. DAVENPORT. Like the confiscation provisions in the existing antitrust law.

Mr. EMERY. I had a particular thought in mind when I said "criminal."

Mr. DAVENPORT. And also the treble-damage feature?

Mr. EMERY. Yes, sir.

Mr. LITTLEFIELD. Every section of the Sherman antitrust law sounds in its criminal features.

Mr. EMERY. I assume that the language in the Senate bill, "for a purpose not unlawful at common law," is intended to set up a standard, and I assume what the gentlemen had in mind in framing that language was the common law of England, but you can not, by any means, presume that the courts of the United States would base any decision as to the validity of such a statute upon any such assumption, because we recognize, in the first place, as axiomatic that the courts of the United States have only such jurisdiction in criminal matters as they are given by statute, having no common-law criminal jurisdiction, and that there is no Federal common law, no common law of the United States, that could be regarded as the standard referred to by the terms "unlawful at common law."

Mr. LITTLEFIELD. Common law does not apply to interstate commerce at all. If it had applied, there would not have been any occasion for the enacting of the Sherman antitrust law.

Mr. EMERY. Of course not. So that the language "a purpose not unlawful at common law" has no significance.

Mr. LITTLEFIELD. Inasmuch as the common law does not apply to the commerce clause and to interstate transportation, how are you going to have any offenses that are unlawful at common law quoad interstate commerce?

Mr. EMERY. That was the question I was about to ask, Mr. Chairman, and endeavor to answer.

Mr. LITTLEFIELD. The suggestion raised that question in my mind.

Mr. EMERY. We can perceive nothing definite about such a standard, in the first place; we can not recognize the incidents of any common law in the subject-matter of this bill, and, in the third place, if it be asserted that the rights of combinations at the common law of England should be taken as the standard of those acts which combinations of labor should be permitted to perform in interstate commerce, I would like to call the committee's attention to what the rights of combinations at common law were, and without going too far back into history—because I do not want to burden the committee's record unnecessarily—I request the committee to note that as far back as the eleventh century there are fixed and definite statutes

that run against the acts of the guilds, then in the full flower of their strength in England, just as this act runs against the operations of combinations of labor when they act in restraint of interstate commerce. Not only did the common law of England at that time forbid acts of combinations in restraint of trade, but the customs and usages, which were the basis of that common law, found their expression in occasional statutes forbidding particular offenses which the experience of the day showed to be the most familiar forms of restraint.

Mr. LITTLEFIELD. Now, inasmuch as this statute, or this amendment here, in any part of it, so far as I have been able to notice, does not undertake to make affirmatively applicable to interstate commerce any of the principles of common law, but is purely negative in its character, what particular consequence is it to us what the common law does? It does not now, or never can, without affirmative language, apply to interstate commerce. This act, so far as I can see, makes the common law affirmatively applicable to interstate commerce. It is perfectly idle to say that things that are not unlawful at common law are not to be prohibited because the common law never did apply to interstate commerce. It does not now, and if this section does not affirmatively undertake to apply the principles of common law, it is perfectly immaterial to us what the common law was.

Mr. EMERY. That simply makes unnecessary any discussion of it.

Mr. LITTLEFIELD. Is that not the obvious situation?

Mr. EMERY. That is what we believe. But inasmuch as it seems to have struck the proponents of this legislation, and I assume that they have most excellent legal advice on this subject, that serious consideration ought to be given to such a standard; that is, that combinations could be asserted and their rights defined by reference to the common law of England; if that standard conveys intelligent rule to the committee, I want to call your attention to what it must mean if it can mean anything at all.

Mr. LITTLEFIELD. I see your point. It may be that that is to be construed as an affirmative proposition.

Mr. EMERY. I assume, from conversations with the proponents of the bill, and references made to this particular change, that they believed that when they declared that men might combine and do certain things for any purpose "not unlawful at common law," they had set up a standard which would be the measure of such rights. Assuming they believe that, I would like to call their attention to what that standard is.

Mr. LITTLEFIELD. If that is your point, you may go on.

Mr. JENKS. May I ask just one question?

Mr. LITTLEFIELD. Certainly.

Mr. JENKS. In citing these matters that date back to the eleventh century and elsewhere, it would seem to be an implication on your part that the common law is not a matter of growth, and that what might perhaps have been common law in the eleventh century has not been changed somewhat in the latter days in England.

Mr. EMERY. I was merely calling attention to the fact that it was of historical interest that the guilds had been restrained—had been condemned for actions in restraint of trade—just as it has been necessary to condemn organizations of labor in our day for actions of the same character.



Mr. JENKS. It is, of course, interesting historical matter, but I understand, then, that you do not mean to assert that the common law of England is, at the present day, the same as it was in the eleventh century?

Mr. EMERY. I assert that the common law of England, except where it has been modified by statute—

Mr. JENKS. It has been modified.

Mr. EMERY. Of course, then it is not the common law. Wherever the statutory law does not apply, the common law is in force.

Mr. LITTLEFIELD. There is no difference of opinion as to what the common law means; it does not mean statute law at all.

Mr. JENKS. The question I asked is whether Mr. Emery considers the common law in England to-day the same as it was in the eleventh century or the sixteenth century. That is the only point.

Mr. DAVENPORT. The common law of England at the present time condemns boycott, as shown in the case of *Quinn v. Leatham* in the House of Lords in 1901.

Mr. MALBY. Of course, our own common law may differ somewhat.

Mr. LITTLEFIELD. There may have been a change in the common law by statutory provisions.

Mr. JENKS. Or by decisions.

Mr. LITTLEFIELD. There is no change by decisions theoretically. It may be alleged by the lay mind that there is change by decisions, but the theory of the profession is that the common law adapts itself to the exigencies as they develop. That, perhaps, may be another way of stating the proposition, but that is the common law and contradistinguished from statute law. Of course, if in the bill here you have undertaken to provide that "under the law of England as existing to-day" that would be one proposition, but when you say "the common law," that is another proposition. You are discussing now what the common law of England is.

Mr. EMERY. We assert, in the first place, of course, that such language is so indefinite in its description of crime that it could not be enforced as a standard in a penal statute; and, secondly, I want to know if I am correct in assuming that what the proponents of the bill endeavor to do by inserting the phrase, "for any purpose not unlawful at common law," is to set up as a standard by which the acts of combinations are to be judged, the common law of England?

Mr. JENKS. The acts of the labor unions in connection with that expression. It should be interpreted in connection with the purpose it is used for here.

Mr. DAVENPORT. You recognize that in the State of Pennsylvania it was necessary to pass a law to remove the criminal features of the common law of Pennsylvania, where men were combining to strike to put up wages—that is, *Coke v. Murphy*—the legislature passed an act to do away with a criminal conspiracy of that character under the laws.

Mr. EMERY. As to the rights of combinations of labor under the common law of England, Mr. Chairman, the law on that subject readily divides itself into practically three periods, the period previous to the repeal of the combination acts of 1824 and 1825, the period from 1825 to the trade union act of 1871, and the conspiracy and protection act of 1875, and the period since 1871, which, for all practical purposes at the present moment, conclude with the passage of the English trades dispute act of 1906.

As to the first period, one of the first cases that your attention is called to is that of *Rex v. Journeymen Tailors of Cambridge* (8 Mod., 10). This was a common-law indictment for combining to raise their wages. There was an old statute, 7 George III, chapter 13, making it unlawful for tailors to make agreements to advance their wages. The court, however, held that the indictment, although not based upon the statute, was a sufficient indictment at common law. In this connection the court said:

A conspiracy of any kind is illegal though the matter about which they conspired might have been lawful for them, or any of them, to do if they had not conspired to do it, and this appeared in the case of the *Tub Women* against the *Brewers of London*.

In 1796, in the case of *King v. Mawbey et al.* (6 D. & E., 619), a case of conspiracy, Judge Grise, in the discussion, made use of the following illustration, which absolutely covers the very point here involved:

In many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy, though the same act if done separately by each individual without any agreement among themselves would not have been illegal. As in the case of journeymen conspiring to raise their wages, each may insist on raising his wages if he can, but if several meet for the same purpose it is illegal and the parties may be indicted for a conspiracy.

So that you see there that any combination of workmen to raise wages became at once a conspiracy at common law.

In 1799, in *Rex v. Hammond* (2 Esp., 719), which was a combination of journeymen shoemakers to raise wages and is affirmed, there is no mention of a statute; it is an indictment under the common law.

In 1819, in *Rex v. Ferguson* (2 Starkie, 443), an indictment at common law charged the defendants with combining to quit in order to compel their employer to discharge apprentices. The indictable feature of the offense was not questioned and the defendants were convicted, fined, and imprisoned. The third count alleged a conspiracy to quit in order to secure the discharge of certain workmen and apprentices.

There are a number of statutes that characterized this first period, up to the repeal of the combination acts in 1824, some defining conspiracy, others regulating the conditions of labor and placing various restrictions on combinations of both masters and workmen. I want to be perfectly fair about it and say that whether the above decisions were based on some of these statutes, as ably claimed by Mr. R. S. Wright in his book on "The Law of Criminal Conspiracies and Agreements," is now a question more academic than practical, because you find that after these statutes were repealed by the combination acts these early cases are accepted and applied as interpretations of the common law.

During the second period, after the repeal of the combination acts in 1824 and 1825, the law of combination is practically left as expressed in the statute of George 4 (c. 129), passed in 1825. These statutes repealed former statutes restricting combinations of workingmen, and provided that combinations of workingmen for certain purposes should be lawful. Interference with other workmen by means of violence, threats, or intimidations, or interference with the employer by like means to compel him to limit his apprentices, or the number or description of his workmen, were declared criminal offenses by this statute.

Two classes of cases arose after the passage of the combination acts, criminal cases and civil cases, the latter involving the legality of agreements entered into by members of trades unions, and the attitude of the courts toward labor organizations under these combinations becomes especially interesting because of their interpretation of what the common law was and is. You find all the decisions of the courts declaring that the purpose of these statutes repealing the combination acts was to exempt combinations of workmen for certain purposes from criminal liability. It did not make combinations of workmen or trade unions lawful in the sense that their agreements would at any time be enforceable in civil actions. The repeal left the common law as to criminal conspiracies in full force and effect. Thus the combinations of workmen to do any act forbidden by the statute, or for any purpose not especially exempted from criminal liability by the statute, were held to be indictable as common-law conspiracies. Trades unions were not recognized as lawful combinations for purposes of civil actions, because their rules and by-laws regulating conditions of labor were in restraint of trade and opposed to public policy. The rules or agreements of trades unions were, therefore, illegal and unenforceable in civil actions.

One or two of the cases in this period will make these distinctions clear, and throw light on just exactly what the courts of the period considered to be the common law.

Mr. LITTLEFIELD. What is the date of this decision you are quoting from now?

Mr. EMERY. *Rex v. Bickerdyke* (1 Mand Rob., 179), 1832.

Mr. LITTLEFIELD. That lays down the common law?

Mr. EMERY. That lays down the common law.

Mr. LITTLEFIELD. That is just what we want.

Mr. EMERY. Indictment at common law charged that the defendants and others conspired to prevent certain hands from working in the colliery. The evidence showed that a body of men met and agreed upon a letter addressed to their employer to the effect that all the workmen would strike in fourteen days unless the obnoxious men were discharged from the colliery.

Patterson, Justice, held that these workmen had no right to meet and combine for the purpose of dictating to the master whom he should employ, and that the combination was clearly unlawful and criminal.

Then, in 1861, *Walsby v. Anley* (3 El. and El., 516; 107 E. C. L.) was a criminal proceeding under the statute 6 George 4 (c. 129). The defendant and others gave notice to their employer that they would strike unless he discharged certain nonunion men.

Mr. LITTLEFIELD. That is the Debs case.

Mr. EMERY. Yes; this case states exactly what would have been the legal position of those strikers under the English common law. It was held that the defendant was rightly convicted. The court in this case seems to find that the burden of the offense was in the conspiracy. This is clearly expressed by Crompton, J., who says:

Although, however, I think that any workman has a right to go to his master and say, "It is my whim not to work in company with so and so," I think that several workmen have no right to combine to procure the discharge of persons obnoxious to them by threatening to leave the employment at once in a body unless those persons are forthwith discharged. It is a matter of common learning that what a man may

do singly he may not combine with others to do to the prejudice of another. Statute 6 George, chapter 129, by repealing all the previous statutes on the subject, appears to have reestablished the common law as affecting combinations of masters or workmen. I adhere to common law as affecting combinations of masters or workmen. I adhere to the opinion that at common law all such combinations are illegal, and that Grose, J., rightly states the law in the passage which I referred in the course of the argument.

Then, in the cases of *Rex v. Druitt* (10 Cox C. C., 592) in 1867 and *Rex v. Bunn* (12 Cox C. C., 316) in 1868, Lord Bramwell and Lord Esher, who was Justice Brett, held that the statutes had in no way interfered with or altered the common law, and that combinations expressly legalized by statute may yet be treated as indictable at common law.

These cases are pretty extreme cases, and they seem, by some of the later decisions, to be discredited and distinguished on account of the conflict between the statute and the common law as to whether the crime was defined by the statute so that the common law no longer applied.

Mr. LITTLEFIELD. There is no dispute about what the common law was; it is simply a question as to what the construction of the statute was.

Mr. EMERY. Yes, sir. In 1867 *Skinner v. Kitch*, Queen's Bench (L. R. 2 Q. B., 393), was a criminal action based upon the statute 6 George 4 (C., 129). The defendant was charged with attempting to force his employer by means of threats to limit the description of his workmen. Defendant was the secretary of a carpenters and joiners' union and notified his employer that the members of the union would quit his employment unless one of his employees, a nonunion man, should join the union. The nonunion man refusing to join the union, and the employer refusing to discharge him, a strike was called. Held that the defendant was rightly convicted. Judge Blackburn said:

The principal object of the statute was to protect both masters and workmen from all dictation as to whom they will employ or serve; and a greater piece of tyranny can not well be conceived than to force the respondent, by the threat of striking, to consent to punish Jordan by discharging him unless he will join the union nor a more proper case for a conviction.

There are several cases at the same time in which trade unions, their by-laws and agreements, are held to be in restraint of trade.

In 1858, in *Hilton v. Eckersley* (6 El. and Pl., 47; 88 E. C. L., 47), a number of manufacturers, for the alleged purpose of protecting themselves against the unlawful encroachments of trade unions, formed themselves into an association. Each member of the association gave a bond in the sum of £500, in which he obligated himself to abide by the will of the majority for the term of one year as to whether he should carry on and conduct or wholly or partially suspend carrying on his works or establishment for the time. The action was brought to recover upon the bond of one of the manufacturers. The defense was that the bond was in restraint of trade, illegal, and void.

The court held that the combination of the manufacturers was illegal in the sense that agreements entered into for the purpose of accomplishing its purpose could not be enforced in a court of law. Judge Crompton said:

I am of opinion that the bond is void as against public policy. I think that combinations like that disclosed in the pleadings in this case were illegal and indictable

at common law as tending directly to impede and interfere with the free course of trade and manufacture. \* \* \*

Combinations of this nature, whether on the part of the workmen to increase or of the masters to lower, wages were equally illegal. By recent enactments, carefully worded, combinations to raise or lower the rate of wages and to regulate the hours of labor are made no longer punishable, but these enactments do not make such combinations legal agreements in the sense that the breach of them can be enforced by law.

So they are modified only so far as the statute applied, but where the statute did not apply the common law obtained, in the opinion of the court, and applied directly to combinations of this character.

These cases could be indefinitely multiplied, but they are quite sufficient, Mr. Chairman, to illustrate what the common law of England is on the subject, and if it should be accepted as a standard, defining the rights of combinations of workmen or laborers in interstate trade, it would quickly raise a situation in which Mr. Gompers and his followers might anxiously pray that they be delivered from the definitions of their friends.

I could call your attention to any number of American cases where the principles here presented, both before and after the repeal of the combination acts, are recognized by our courts to have been the common law of England, and where they have expressed in statutes in various of the States attention has been called by the judges in the course of their decisions to what the common law was before statutes passed by State legislatures were applied, and I call your attention to one out of many such decisions merely because it shows that the judges in the American courts entertain the very opinion which I have expressed as to what the common law of England was.

Mr. LITTLEFIELD. In discussing the common law, they go back to England for the purpose of ascertaining what the common law was?

Mr. EMERY. Yes.

Mr. LITTLEFIELD. That is the common law that is used in jurisprudence?

Mr. EMERY. Yes, sir.

Mr. LITTLEFIELD. That is what gives it this definition.

Mr. EMERY. Here is a case, and it is a striking one, because it is predicated upon a condition that frequently occurs in the trade disputes of this day, and you can see at once that were this the standard by which the rights of men acting in combination in interstate commerce should be measured, it would be a standard which the gentlemen themselves would be the last to desire or accept. This is the case of the *People v. Fisher* (14 Wendall, 1), a New York case, decided in 1834. I will just call your attention to the facts constituting a conspiracy. It is true the question was whether or not a statute against conspiracy applied, but the court, in discussing the statute, discusses the common law with respect to the very things covered by the statute, and says they would have been in violation of the common law. (*The People v. Fisher et al.*) The court held:

A conspiracy of journeymen of any trade or handicraft to raise their wages by entering into combinations to coerce journeymen and master workmen employed in the same trade or business to conform to rules established by such combination for the purpose of regulating the price of labor, and carrying such rules into effect by overt acts, is indictable as a misdemeanor; and where journeymen shoemakers conspired together and fixed the price of making coarse boots, and entering into a combination that if a journeyman shoemaker should make such boots for a compensation below the

rate established, he should pay a penalty of \$10; and if any master shoemaker employed a journeyman who had violated their rules, that they would refuse to work for him, and would quit his employment, and carried such combination into effect by leaving the employment of a master workman, in whose service was a journeyman who had violated their rules, and thus compelled the master shoemaker to discharge such journeyman from his employ—that the parties thus conspiring were guilty of a misdemeanor, and punishable accordingly.

That was recognized as the common law of England at the time that I have described, and a statute substantially stating it was enforced in this case. This was a unanimous opinion of the court, rendered by Chief Justice Savage.

Mr. MALBY. That was under a statute?

Mr. EMERY. Yes, sir; but I want to call attention to what the court said with reference to the common law in this case. In discussing this matter the court said:

The question therefore is, is a conspiracy to raise the wages of journeymen shoemakers an act injurious to trade or commerce? The words trade and commerce are said by Jacobs, in his Law Dictionary, not to be synonymous; that commerce relates to dealings with foreign nations; trade, on the contrary, means mutual traffic among ourselves, or the buying, selling, or exchange of articles between members of the same community. That the raising of wages and a conspiracy, confederacy, or mutual agreement among journeymen for that purpose is a matter of public concern, and in which the public have a deep interest, there can be no doubt. That it was an indictable offense at common law is established by legal adjudications.

Mr. MALBY. How would you suggest to change this language in order to accomplish the purpose or design of the introducer of the bill?

Mr. EMERY. Do you mean as to substituting language "for any purpose not unlawful at common law?"

Mr. MALBY. Yes.

Mr. EMERY. I would not attempt a suggestion. Of course, it is unnecessary, Mr. Chairman, to call your attention to similar decisions in respect to the status of the common law in other States. One case for illustration is as good as many. Of course if the gentlemen suggested that they refer to the common law of the United States, there is, in the first place, no common law of the United States, and if they attempt to refer to the common law of any one State, they would simply be setting up 46 different standards.

Mr. MALBY. I asked you what change you would suggest to accomplish the purpose they had in mind, and that would involve the effect of the decisions you called our attention to.

Mr. EMERY. So far as these decisions are concerned, they have no application to the state of facts upon which this measure is predicated, except it were the intention of the framers of the bill to set up as the standard, what men in combination could do under the common law of England as it obtained.

Mr. MALBY. Of course, under the bill, according to your decisions here, they would get no exemptions at common law, because at common law all these acts were criminal.

Mr. EMERY. Certainly, the common law is far more drastic than any decisions that any court of the United States has ever rendered.

Mr. MALBY. That is to say, the language of the bill would give no exemptions.

Mr. EMERY. If the language used could incorporate the standard proposed, it would not only be a complete denial of the rights which the gentlemen claim have been impaired, but it would take from

organized labor the right of combination itself, which, of course, has not been at any time threatened by any decision of the Supreme Court of the United States or the inferior Federal courts.

Mr. DAVENPORT. Is it not a fact, Mr. Emery, that the common law of the different States on this very subject differed, has always differed, and differs now?

Mr. EMERY. Certainly.

Mr. DAVENPORT. So that the alleged standard put in there is something that is utterly uncertain?

Mr. EMERY. It is utterly meaningless.

Mr. DAVENPORT. And the incorporation of that into the existing Sherman law would destroy the Sherman law?

Mr. EMERY. Absolutely. In the first place, as we have asserted it is not any standard at all; in the second place, if it could possibly be accepted as a standard, and meant the arbitrary thing we have set forth that it must mean, such a consummation would be the last thing to be "devoutly wished for" by the gentlemen who ask exemption from existing law.

Mr. LITTLEFIELD. It may be contended that the common law in the State where the controversy arises would apply to that particular trial. I do not know what the proposition may be, but that might be contended.

Mr. EMERY. This is a Federal statute.

Mr. LITTLEFIELD. But if the man is prosecuted in Maine, and that had a common law peculiar to itself, it might be contended that the common law applied. Then, when you got into the State of New York—of course, I do not know the theory may be—you might get, on the same state of facts, another rule of law in the same tribunal, provided the Federal tribunal was to be governed by the common law of the State where the offense was to be tried.

Mr. EMERY. That would set up 46 standards, for criminal offenses.

Mr. LITTLEFIELD. Assuming that there are 46 different standards.

Mr. EMERY. There could be at least 46.

Mr. LITTLEFIELD. There might not be a difference in all of them.

Mr. EMERY. There would be very marked differences in many of them from Massachusetts to Oklahoma.

Mr. LITTLEFIELD. That is not peculiar to combinations, because there is difference in the application of common-law rules in civil actions.

Mr. EMERY. No, I am simply stating what the condition is.

Mr. LITTLEFIELD. But it is not peculiar to this state of facts.

Mr. EMERY. I did not wish to and I do not feel that I can add anything to the technical discussion of this subject, in which Judge Davenport has elaborately indulged. But I want to call the attention of the committee to what we believe are very substantial general objections to this type of legislation, because, Mr. Chairman, after all it is of little importance what the technical defects of legislation are when its substantial purpose, the thing it seeks to accomplish, and the means by which it hopes to do it, are in contradiction with the fundamental law of the land and the very spirit of the nation.

In the first place, it seems to me that the gentlemen have framed their legislation upon an utterly inadequate conception of the purpose of the interstate commerce power of Congress. To anyone at all familiar with the circumstances under which that power came into

being it is known, from the discussions in the Constitutional Convention, from the conditions of intercourse between the colonies prevailing from the end of the Revolution until the adoption of the Constitution, from frequent allusions to the distressing circumstances that accompanied interstate intercourse in the letters of Hamilton, of Madison, of Jefferson, from the discussions in *The Federalist*—from multifarious sources we know that intercolonial intercourse was constantly hampered, impeded, and sometimes prevented by the exercise of the independent and exclusive powers of the several colonies. They laid tribute each upon the commerce of the other.

At one time New York had an import income of between £60,000 and £80,000 a year because of the duties it levied, not only upon foreign commerce but upon the commerce of other colonies, and they did not carry a stock of firewood or a dozen eggs into New York from New Jersey without paying import duty, and at one time the friendly relations between New Jersey and New York were severely strained. The same difficulty existed among the other colonies, leading Connecticut, for example, to at one time suspend all commercial intercourse with New York. Those colonies which had harbors took advantage of their position to lay import duty upon all those who needed to use them and had to pass through their territory. So that the most inharmonious feeling was being aroused among the colonies, when it occurred to the fathers that it was most necessary that the intercourse between the States should be unimpeded and free to all the citizens of the nation if they were to be a nation at all. Mr. Hamilton dwells upon this at great length in *The Federalist*. So we find that the original idea of giving Congress the power to regulate interstate commerce was to prevent the interference of States with it, and to keep the pathways of trade absolutely free and clear. If any such notion had prevailed as these gentlemen suggest in their theory of to-day, carried to its logical consequence, that the power to interfere with interstate commerce depends upon the fact that the combinations or organizations engaged in it have capital stock, some colonial quibbler might have suggested in his day that the several colonies that were about to form the American Union were not organizations for profit, had no capital stock, and it was utterly impossible, therefore, that any colony could interfere with the intercourse of another.

Interference with interstate commerce is an exceedingly serious matter, and the power of Congress to prevent it has been recognized to be exclusive and plenary, for the reason that there had to be some central authority with the power to keep clear the highways of intercourse. It does not make any difference whether the interference "is physical or economic, whether it is a sand bar or a mob or a monopoly, whether it is the ship sunk in the channel or the combination that seeks to stifle competition," the power of Congress to remove any form of obstruction is absolute; and not only is it their right to do so, but I submit it would be their duty to do so. Yet gentlemen propose here that the measure of men's power to interfere with interstate commerce shall be accepted as the capital that they possess, or the fact that they are engaged in business for profit, as though we had not abundant experience to demonstrate that combinations not for profit, without capital stock, not only could but had absolutely paralyzed the entire interstate commerce of the nation, under the leadership of Debs in 1893.



If it be the duty of Congress to prevent the obstruction of intercourse, why should it consider for one moment the attempt to establish arbitrary, impracticable, unjust, and impossible distinctions between any one force that can interfere with interstate commerce and any other force that does interfere with interstate commerce? What reason can possibly be given for saying that you shall guard exclusively against corporations with capital stock threatening economic interference and blind your eyes to the notorious fact that the most damaging and extensive obstructions of interstate commerce have come and can come from voluntary associations that deliberately tied it up, as Judge Taft said in his address to the American Bar Association, for the purpose of taking the American people by the throat in order to force the acceptance of some industrial condition demanded from an employer?

In the second place, Mr. Chairman, I do not assume that any committee of Congress, least of all its great law committee, can avoid some consideration of the moral aspects of proposed legislation, especially when the President in his most recent message has dwelt with particular emphasis upon the importance of observing great moral considerations. In concluding his last message the President said:

We are striving for legislation to minimize abuses which give this type its flourishing prominence, partly for the sake of what can be accomplished by the legislation itself and partly because the legislation marks our participation in a great and stern moral movement to bring our ideals and our conduct into measurable accord.

Now, sir, if we consider the morality of this proposal, I ask the committee to meditate for a moment upon what this measure involves. Something that Senator Vest said, during the course of the debate on the Sherman Act, sums up its substantial underprinciple. You will remember that Senator Ingalls proposed an amendment to the Sherman antitrust act to regulate dealing in options and futures, which was considered at that time a most serious evil and was the subject of the severest excoriation on the floor of both Senate and House. Senator Ingalls sought to meet that by fixing a very high license upon dealing in options and futures, while at the same time he vigorously denounced the practice, and Senator Vest, one of the great lawyers of the Senate, said:

This is an original bill to raise revenue, providing revenue, putting on a tax, and it performs the most remarkable act of legislative legerdemain ever known since the foundation of the world. It licenses an illegal combination, which it denounces as opposed to the laws of the United States and all the States. In other words, we say to the option dealers, "You are a lot of criminals, thieves, and robbers, but if you will give us a thousand dollars we will let you go on robbing."

Now, sir, this proposed amendment to the Sherman antitrust act does not change the nature or the quality of a single act of combination or monopoly in restraint of trade. The first six sections of the act, under the theory of the proponents, remain unchanged. It continues to denounce all those things as vehemently, as bitterly, and as sternly as it ever did, but to the executive department of the Government is given the most remarkable dispensing power that has ever been suggested under constitutional government. The power of pardon is to be exercised; the gentlemen assert it. The power of amnesty they hint at, but those powers have never been applied except to past acts. Never have they been suggested as a means of

granting, not a pardon, but a permission for future unlawful conduct. The exercise of Executive clemency, the granting of immunity for evidence that aids the State in enforcing its laws, the forgiveness of offenses, whether committed against particular States or against the Government of the United States, has looked squarely to the past. Never has the Government of the United States said to any individual, or any body of men, "Do for me certain things I shall ask of you, and for the future you have permission to violate the law." One of the complaints made by our ancestors over four hundred years ago, when English Government was in its formative stage, was that the King deliberately and continuously attempted to suspend the operation of the law on behalf of his favorites or on behalf of particular classes of citizens, and the great English rebellion was founded very largely upon the continuous claim to that power by the Stuarts. Because of such action Charles I. lost his head and James II. his crown. And after the great rebellion one of the first things inserted in the Bill of Rights was that the "King shall have no power to suspend the operation of a law."

What is proposed here except a suspension of the operation of the law? It makes no difference whether the power conferred upon the Commissioner of Corporations be a legislative or a judicial power, or if it be conceived a just exercise of executive or administrative discretion, the power sought is granted to him for no other purpose than that he may in his sweet will suspend the future operation of law, granting to that company or combination that has given information to the Government, which it has no direct right to exact, absolute immunity from the bulldogs of Federal prosecution. You turn loose a Commissioner of Corporations, or the Interstate Commerce Commission—it makes no difference what administrative power you give it to—considering the magnitude of the task, it might well have been conferred upon the Pension Office, or in view of the increased appropriation for an enlarged Army more needful aid might there be found for its execution or the former officers sit with the later Commission in the "Siege Perilous" to determine arbitrarily a standard by which combinations are to be measured with no legal standard to assist or guide him.

Mr. LITTLEFIELD. It may be said right here, and which standard he declined to disclose to the committee.

Mr. EMERY. I am about to call attention to that.

Mr. LITTLEFIELD. Although the committee intimated to him that it would not be likely to give him the discretion unless it knew what the standard was.

Mr. EMERY. The gentleman refused to disclose either his practical standard or to say whether or not the overruled judicial standard which he quoted with approval would be the rule which would guide his actions. The committee will remember that he quoted with approval the decision of Judge Sanborn in the Trans-Missouri case, and he expressed in practically the language of the judge the attempt at distinction between reasonable and unreasonable combinations in restraint of trade.

But, sir, leave the Commissioner of Corporations there for a moment, glooming over his dream of vanished power, or leave him in the midst of the Interstate Commerce Commission, with his scepter of office and wise men about him, before him for solution a thousand

forms of the problem that has threatened the harmony of the Supreme Court, Bouvier's Law Dictionary open at the word "unreasonable," as Professor Jenks suggests, and the interstate commerce of the nation waiting his sovereign will.

What good reason has been given for such legislation as is here requested? Who seeks it, and why? One after another witnesses have appeared and declared that the business men of the country demand a change, that they find themselves conducting their business under conditions that make them innocent criminals; yet in the whole course of this hearing, not one single man has given to this committee one single concrete instance of a combination that men would like to make that they would dare to suggest was a rightful combination, one in the interest of public policy, that they ought to be permitted to make, and which the Sherman antitrust law forbade them to make. The Commissioner of Corporations himself was absolutely unable to suggest any such combination, but he did intimate that there were a great number that questioned their own legality that he could quickly decide not to be in unreasonable restraint of trade, obviously suggesting that his standard of judgment was already established in his own mind, and that he knew of a great number of combinations in the business world which, in his opinion, should be permitted to combine and act for purposes which he believed at the present time they were not legally authorized to do; yet the only one he suggested was so obviously against public policy and so obviously a restraint of trade that no man would care to approve publicly that he apparently withdrew it.

Mr. LITTLEFIELD. You mean the one where the lumbermen wanted to reduce the output to increase the price, ostensibly to preserve the forests?

Mr. EMERY. That seemed to be the real purpose.

Mr. LITTLEFIELD. I may say that they intimated to me that they wanted to collaborate with the Forestry Bureau for the purpose of maintaining the original supply, and I invited them to come before the committee and explain in detail what they wanted and how they wanted to accomplish it, but up to date they have not arrived.

Mr. EMERY. The only intelligent explanation made by any business man before this committee as to particular forms of combination which they desired to make, and which they feared they could not make under the existing law, was made by Mr. Towne, representing the Merchants' Association of New York, and I think Judge Davenport clearly showed to you that practically all the combinations he referred to you were outside the operation of the act, and I venture to say, Mr. Chairman, that there is upon the part of many business men as clear a misapprehension and misunderstanding of what the limitations of the Sherman antitrust act are as there is among labor organizations as to the meaning of the Loewe decision in the Danbury hatters' case.

Now, Mr. Chairman, the testimony of the Commissioner of Corporations to this committee was very significant. It illustrated the fact that the official upon whom this tremendous autocratic power would be conferred was unwilling or unable to state what the standard of judgment would be yet asked that the law committee of Congress should blindly recommend the passage of his remarkable legislation without any intelligent explanation of its practical operation.

Mr. MALBY. Of course, he could not state a standard where the law authorized a discretion.

Mr. EMERY. He could state one of two things, Mr. Malby, either the practical standard that would, in his opinion, fairly measure a reasonable or an unreasonable restraint of trade, not of course with reference to a particular contract, for no one could ask him to pass upon a question in advance that must be passed up to him in actuality, or he could present a legal standard that would clarify the discussion.

Mr. LITTLEFIELD. As to the standard, as to what would be involved in determining a fair standard, he distinctly refused to state.

Mr. EMERY. The ground upon which this authority is chiefly sought seems to be, Mr. Chairman, that there is desirable a greater publicity as to the acts of corporations, monopolies, and various contracts affecting interstate commerce. This committee know well that the power of Congress does not extend to every individual corporation or combination that happens to engage in interstate commerce, except to the extent of that interstate commerce. It can not regulate or supervise them on the conjecture that they are liable to, or may do so, or intend to, and it seems to me that the axiomatic objection made by the great Chief Justice Marshall in 1825 to the attempt to do things indirectly that can not be done directly is very suggestive at this stage: "That which can not be done directly for defect of power can not be done indirectly for the same reason."

There is not any question that a vast amount of the information that is here sought can not be exacted by Congress from private corporations through any power which it presently possesses, and it is sought here to get it by giving immunity from law, so long as the six sections of the Sherman antitrust act remains in force. It may even be said that it is sought to get it by permission to commit crime, for this is a penal statute, and a great number of offenses enumerated in here are called crimes. Under what authority and under what claim of expediency can it be asserted to be good legislative policy to confer upon any executive officer of the Government the right to pass laws to meet particular conditions? For I believe the argument of Judge Davenport with respect to the law to be perfectly sound, and I think that you gentlemen can see easily that in every case where the Commissioner of Corporations is asked to pass upon a formal contract or asked to pass upon this or that form of combination it is he, and he alone, who not only declares it to be "reasonable or unreasonable," but is left to establish, absolutely, the standard by which that determination is to be reached. This legislation proposes no standard. It is therefore the will of the Commissioner which not only arbitrarily declares what is reasonable or unreasonable, but establishes a private decalogue by which to judge it.

The only claim upon which such a demand for power could be predicated is the existence of an extraordinary condition in the business world that requires it to be found and used where, in the opinion of the recommender, it could be most effectively used. Kneiss, the German writer, calls attention to exactly the same condition when the King and council sought to obtain the powers necessary to do the things that, in the King's opinion, were absolutely essential to the welfare of the people, just as Cromwell in his time claimed what President Roosevelt has so aptly phrased in his life of Cromwell in describ-

ing the usurpation of alleged necessary authority, "Nobody doubted that Cromwell wanted good government, but he insisted that he alone should be the judge of what constituted good government." Kneiss says that the King in his attempt to secure from Parliament or to exercise rights that were denied to him by the existing bill of rights, declared that his power rested on an idea of "extraordinary dictatorial power residing in the King which in any state crisis could thrust aside self-imposed laws and judicial constitution and find a remedy by extraordinary measures, jurisdiction, and ordinances."

What other reasons can be found, Mr. Chairman, for the demand for such power at this time, or for the attempt to exercise it in such a remarkable manner, and is Congress to pass such legislation without any reference whatever to the unusual possibility for the abuse of such power? Is it not true that men are still human, still subject to the temptations that come from the possession of a vast and arbitrary authority? Can you not conceive as quite possible a condition in which officials less upright, less virtuous, less full of integrity, less filled with the spirit or the desire to do great things for the public welfare than the individuals who occupy them to-day, might hold the office of President of the United States and Commissioner of Corporations? Can you conceive a greater temptation to an individual than one that would come in times of great national elections when the support of men of great fortunes might be desired to aid in dire necessity this or that particular party, whether it be that in power, seeking to retain its supremacy, or its opponent, desiring to have the national authority transferred to its care and willing, possibly, under the temptation of a supreme struggle, to promise considerations of the greatest importance to powerful and wealthy corporations or combinations?

Mr. LITTLEFIELD. You refer now to that part of the act which vests the President with the general power to change the regulations any time he likes?

Mr. EMERY. Yes, sir; and also the various powers in the Commissioner of Corporations.

Mr. LITTLEFIELD. But the President has the power to establish new regulations and eliminate every corporation that is already registered.

Mr. EMERY. But he has also the power to change the conditions under which an organization may either register or under which its registration may be canceled, and he has the power to fix general regulations as to what information shall be required of any corporation or any combination.

Mr. LITTLEFIELD. Then your proposition is that he may make them, as he pleases, more or less onerous?

Mr. EMERY. Certainly; and, sir, if it be the lawful conference of a discretionary administrative power it is not subject to review by any court, and if it is an improper conference of executive authority then it ought not to be conferred, because it is unlawful. But, sir, if such a power was conferred, and if a condition of facts exists in this country such as the one upon which the demand for such power is predicated; if, as Mr. Andrew Carnegie declared in his letter to Mr. Low—and he is certainly an authority on the subject—if ninety-nine out of one hundred restraining combinations ought to be suspected and only the one—just one—permitted to do the things

which this bill would permit combinations to do, then there exists, sir, a tremendous power, a power of money, of enormous and widespread influence, which the daily press, daily life, and the constant utterance of public men make familiar and certain. If that power exists in all the dreadful forms of popular apprehension in the inspired descriptions of executive communications, it is a most real and dangerous power, unscrupulous and enormous. If it has one tithe of the influences or one small fraction of the wickedness constantly attributed to it, imagine, if this committee can, the possibilities of temptation it could present to men or party struggling in a critical contest for national control, the tribute of corporate kingdoms spread seductively before anxious politicians, the riches of Cræsus loitering about empty party treasuries, and should a party fall 'twould fall as Lucifer, for the last vestiges of representative government would disappear and the most absolute oligarchy of wealth that ever lived would sit upon a Federal throne.

And now, sir, what business men are clamoring here for this legislation? I think I have the right to say that I represent a larger aggregation of business interests than any other man who has appeared before this committee. There are numerous well-known industrial corporations and combinations represented among the associations, of which I have supplied a list to this committee. They are solid, substantial business interests; they are the employers of millions of men; I can say it advisedly, I believe in the neighborhood of three millions. They represent billions of money invested in business. They are manufacturers scattered over every part of this country. Are they asking relief from this oppressive measure? Are they demanding the right to enter into contracts and combinations which they believe they have but do not care to explain, which they believe this law unjustly restrains them from doing?

Mr. LITTLEFIELD. You mean the Sherman antitrust law?

Mr. EMERY. Yes. I speak of the law and not the bill. They are great and substantial business interests, and they have not asked for such legislation because they realize fully, Mr. Chairman, that where an evil of great magnitude threatens, there must be small and transient inconveniences for a few that there may be secure and permanent protection for all. The business men of this country, I think, as a whole, are fairly familiar with the general features of this particular measure. They have some appreciation of the inherent difficulties of legislation upon this subject. They realize the Sherman law to be a remarkable achievement. The whole debate in the Senate and House while the Sherman Act was under consideration emphasizes its innate difficulties. Many of the finest legal minds, some of the most practical men in the public service were oppressed with the burden of their subject. They did not take it lightly; they considered their subject from the 14th of August, 1888, until the 20th of June, 1890, when the act was passed. There is hardly an aspect of combination activity in interstate commerce that was not there suggested, and it is astonishing to observe that many of the most important interpretations of the courts were during the course of the various debates practically anticipated. You find the Knight case almost fully discussed by Senator George of Mississippi, and you find Senator Edmonds protesting, time after time, against proposed amendments on the ground that they would overleap their power and fall helpless

in the domain of intrastate commerce. He knew the exceedingly narrow compass within which Congress could act, and as Senator Spooner said in 1900, ten years after the act was passed, no greater body of lawyers ever sat in Congress, or ever gave greater and more impartial study to a great legislative measure, and he believed they exhausted the power of Congress on this subject.

To-day some think that the act is irksome, that it goes too far. The framers of this act could never be accused of being radical. Surely George of Mississippi, Vest of Missouri, Edmunds of Vermont, Gray of Delaware, Coke and Reagan of Texas, whatever may have been said about them, were never accused in their day of radicalism. They were, and are still, regarded as men of moderation, and yet you find each of them, after the report of the Judiciary Committee, making only one objection to the bill; they did not believe it went far enough, and they would have liked it to go further. They made the law just as broad and just as general as they could. That law has been before the courts of the United States over 250 times. It has been before the Supreme Court of the United States fifty times at least. It has been pretty thoroughly applied and interpreted, and I rather doubt legal lights who say that they can not understand what it means and that they themselves are in doubt and difficulty as to whether it applies to particular cases. It seems to me that there is not a piece of legislation on our statute books that has received more thorough consideration from the highest courts. It is a great and effective law, because nobody denies its effectiveness; gentlemen are asserting here that it is too effective, that it reaches too many and goes too far, although in spite of the complaints before this committee we can not see any evidence in the criminal courts of this country that the Federal Administration has pressed it too far or too energetically; on the contrary, there seems ample room to believe that it could have been pressed with much more vigor quite recently, if the Loewe decision had been applied to a number of combinations whose activities were and are criminal as well as unlawful.

Mr. LITTLEFIELD. Did you read the last message?

Mr. EMERY. I did.

Mr. LITTLEFIELD. Did you find there the evidence of a combination that seems to have been discovered by a gentleman outside of the Department of Justice?

Mr. EMERY. I saw that, a combination of steel men in Boston, and I call that to your attention because that form of a combination could be legalized by the Commissioner of Corporations under this bill. What is to prevent the Commissioner of Corporations from declaring it not in unreasonable restraint of trade?

Mr. MALBY. I see by the more recent utterances that they do not agree with the President about it.

Mr. EMERY. The parties to the combination?

Mr. LITTLEFIELD. A legal gentleman by the name of Nathan Matthews seems to have discovered this condition. What I have been wondering is why the Department of Justice does not seem to reach the result as well as Nathan Matthews.

Mr. DAVENPORT. The great trouble about it is that most of those things are entirely outside of the scope of the Sherman Act.

Mr. LITTLEFIELD. This seems to have been considered by Mr. Matthews to be within the scope of the Sherman Act. I notice that Mr. Spelling is here, who is in the employ of the Department of Justice, and we might penetrate our views into the Department of Justice through Mr. Spelling. I suggest that there is no reason why the Department of Justice should not discover these things as well as exceptional conditions.

Mr. SPELLING. I am listening only as an individual.

Mr. EMERY. So far as that particular contract was concerned, I did not even read it; I saw it referred to both in the press some time ago and in the Presidential message, but it is a fact, Mr. Chairman, that if such a contract does happen to be in restraint of trade, under the power conferred upon the Commissioner of Corporations here, it is entirely in his discretion to say that such a contract would be in reasonable or in unreasonable restraint of trade. We have had considerable difficulty with this bill, because the shy and modest violets of the bar, whom we are told are largely responsible for its legal phraseology, have not seen fit to explain what is meant by particular portions of it.

But let me call your attention to another unusual provision in the bill. Possibly Judge Davenport discussed it, because it would be a matter of special interest to him. I noticed it was asserted here on the first day of discussion, and afterwards, that this bill did not intend to interfere in any way with existing actions; that all rights of action presently in existence were left undisturbed.

Mr. LITTLEFIELD. I do not think that is quite it. I do not know but what it was stated that way; but the further proposition was whether it interfered with the amount of damages that could be recovered in any existing action, which is quite a different thing from the right of action. The right of action may be still maintained, but people prevented from recovering treble damages.

Mr. EMERY. If one speaks of the right of action under existing law, he would naturally refer to a right of action to recover treble damages, but if a bill is presented that interferes with the amount of damages that could be recovered under an action before any court, it would seem indeed that such a provision did interfere with an existing right of action.

Mr. JENKS. There was certainly no intention whatever to have this bill lessen the amount of damages in cases now pending.

Mr. LITTLEFIELD. The bill says so.

Mr. JENKS. My impression is it does not do anything of the kind.

Mr. LITTLEFIELD. I think the gentlemen who drew the bill, and probably drew the redraft, have been unfortunate in expressing themselves. Why they beat about the bush to legislate these people out of court in one section and legislate them in in another I can not quite see. I know what your view is, but there is not the slightest doubt to my mind, their attention is already called to it. I called your attention to it in the beginning, that this act did, in one section, legislate them out of court, although it undertook to legislate them in in another. Here they present their redraft, but they did the same thing, when three words would have taken care of the whole thing. Why do they use that verbiage? Of course you are not responsible



for it, but I think the attorneys who drew that could have done that in a more direct way. I do not think there is any legitimate purpose to be obtained in that method. That is not a criticism of you, Mr. Jenks, because I do not hold you responsible for the legal phraseology of this bill or this amendment.

Mr. EMERY. It certainly gives the bill an appearance of having been framed, so far as that section is concerned, with the intention of relieving persons presently in court of the penalties being enforced against them.

Mr. JENKS. I can say with perfect positiveness that that was not the intention, in any sense, and if that is thought to be the effect of the bill, I trust the committee will see to it that it is changed.

Mr. EMERY. Professor Jenks realizes that I am not reflecting on him, but what I want to say is that we naturally conclude that a bill of this kind means what it says and hold people for the foreseen consequences of their own acts, and it can not be said that attorneys of the distinction of the gentleman who framed this language were without a full knowledge of its meaning.

Mr. JENKS. The last section covers it fully.

Mr. EMERY. Section 7 goes on to restrict a plaintiff to the recovery of actual damages, and says:

That in any suit for damages under section seven of the said act approved July second, eighteen hundred and ninety, based upon a right of action accruing prior to the passage of this act, the plaintiff shall be entitled to recover only the damages by him sustained and the costs of suit.

The fourth section goes on to provide, on line 7, page 9:

Anything herein contained to the contrary notwithstanding all actions and proceedings now or heretofore pending under or by virtue of any provision of the said act, etc.

That language only applies to the fourth section. It does not say "anything in this act contained;" it says "anything herein contained," and certainly no one could construe it to apply to anything more than the section of which it is a part.

Mr. LITTLEFIELD. All that the last section does is to provide that the action can be prosecuted to final effect. That does not affect the right of action. The right of action is for the injury; the damages is an entirely different thing, and the act goes on to say, "and all judgments and decrees heretofore or hereafter made"—they might have a judgment in their favor for single damages only—"in any such actions or proceedings may be enforced in the same manner." You provide here by section 2 for a judgment only for single damages, and then, in order to rehabilitate these people, provide that that judgment and that decree shall be enforced just exactly as it would have been if this act had not been passed. So it would, but it would only be for single damages. I do not know whether these fellows meant it or not, but the significance of it is, and I called attention to it, that it did legislate them out in one section and legislated them in in another. This does not even legislate them in. I do not think you intend that.

Mr. JENKS. I do not think that was what was intended by any person working on this bill.

Mr. LITTLEFIELD. I will not go so far as to say that the lawyers who drew it intended it, but if they did not, they were extremely unfortunate in the language used.

Mr. DAVENPORT. Professor Jenks, in doing it, if those persons who have been subjected to all this loss and injury have not yet brought suit they are to be cut out? You do intend to let them out under the treble damage clause?

Mr. JENKS. Because we think that clause is unjust.

Mr. LITTLEFIELD. Is it any more unjust in the suits now pending than in the suits hereafter to be brought?

Mr. JENKS. I shall speak on that subject.

Mr. EMERY. I want to say a word with reference to this proposal to amend the seventh section reducing treble to actual damages. The whole tendency of the amendments suggested to this law from 1890 to date has been to increase the penalties of the law, and not decrease them. The chairman of the committee will remember that in a bill he introduced in the House the punishment, instead of being six months' imprisonment with a fine of \$5,000, was raised to two years' imprisonment with a fine of \$5,000, and the attempt being made to make the penalties heavier, not lighter. Mr. Ray, of New York, said in the House on June 2, 1900:

I desire to say in regard to that proposed amendment that it adds the proviso that the minimum sum to be recovered shall not be less in any case than \$250 and the costs of suit, including a reasonable attorney's fee. Under the present law the person recovering damages for a violation of the interstate-commerce act of 1890 recovers so small a sum that his remedy is inefficient, and he will not go to the expense of engaging a lawyer and instituting proceedings to enforce the law. The result is that the law has not been enforced. People choose to suffer the ills that they do suffer by reason of a violation of their rights (rather) than to go to law to recover a quarter of the sum they have to expend in order to obtain their damages. Therefore the committee has thought it advisable and wise to add that proviso, so that a person recovering damages will recover a reasonable attorney's fee and \$250 damages, if he recovers anything.

So the tendency of Congress has been to make the penalties more severe. There is absolutely no reason for the distinction, except one, and that is the proposition hinted at and suggested, and I suppose it will ultimately be asserted that combinations of labor acting in restraint of trade ought not to be punished like others who act in restraint of trade.

Mr. LITTLEFIELD. I suppose this provision is general.

Mr. EMERY. It is general, but the course of the discussion here has suggested that the proponents of this bill believe that on account of some alleged bitterness existing between organizations of employers and organizations of labor there is a tendency to enforce this bill with some bitterness, so that organizations of labor liable for treble damages would be sued in various parts of the country and the property of the members, if they had any, would be levied in execution. The gentlemen have framed that section of the bill with the thought of relieving combinations of labor as much as possible from the consequences of their criminal acts. What reason is there for endeavoring to create not merely a favored class of combinations, but, after they have violated the law, providing a favored class of criminals? That withdraws equal protection of the law absolutely.

Mr. LITTLEFIELD. This section applies to all combinations.

Mr. EMERY. I know it does. It applies to all in the reduction of damages from treble to actual, but the practical purpose was to protect one kind of offenders.

Mr. LITTLEFIELD. But the legal effect of it is universal.

Mr. EMERY. The legal effect of it is universal, but the practical effect is what I emphasize.

Mr. LITTLEFIELD. I want to make this inquiry, whether or not, in your judgment, if this amendment prevailed and the provision as to treble damages was repealed, it would be possible for a plaintiff sounding on a cause of action of that character to recover exemplary or punitive damages of the defendants?

Mr. EMERY. I do not see how he could. His damages would be confined to the amount fixed by the statute.

Mr. LITTLEFIELD. If your construction is sound, and the amendment was adopted, that would create an extension of the ordinary rule of damages that applies to all sorts of torts, because it is a principle of common law that under proper condition a jury may assess damages by way of example or punishment. That is, under cases of great aggravation. That, I think, applies to all torts.

Mr. EMERY. Perhaps our strongest objection to this measure is based upon the deliberate attempt, through section 4, to legalize, so far as such a statute may, the doing of things by combinations of workingmen in restraint of interstate trade that are forbidden to combinations of any other kind. I am not going to discuss the effect of the language in section 4. It has been fully discussed by Mr. Davenport, and I can not see any reason to doubt that the construction that he has placed upon it is correct and that the effect of such language would be not to legalize the boycott, if you please, but to withdraw any penalty now existing against its application to interstate commerce.

Mr. LITTLEFIELD. The amendment is section 3.

Mr. EMERY. Section 3, yes, sir; "nothing in this act"——

Mr. LITTLEFIELD. Then withdraw section 4 and substitute for it section 3.

Mr. EMERY. It is simply changing the position of the sections.

Mr. LITTLEFIELD. That is the one that contains the qualification of "unlawful at common law."

Mr. EMERY. We hold that the effect of that section is, so far as such a statute can, to legalize the boycott of interstate trade, to legalize the black list by permitting employers to combine to prevent men from securing employment, to legalize, by the language "strike for any cause," combinations to strike without any reference to the purpose of the strike, whether it be malicious or otherwise, and all forms of sympathetic strikes where innocent persons are attacked.

Mr. LITTLEFIELD. A "strike for any cause;" would that authorize a strike such as was passed upon in the Debs case?

Mr. EMERY. Surely; not only in that case, but in the Toledo and Ann Arbor case, under the famous rule 12.

Mr. LITTLEFIELD. Was that the case of *Geiger v. Otis*?

Mr. EMERY. No; the Toledo and Ann Arbor *v. Pennsylvania et al.* That is where the Toledo and Ann Arbor Railroad sought an injunction against the Pennsylvania Railroad because they were about to make a breach of contract to haul their cars. The Buck's Stove and Range Company might supply a suggestion for a combination of another kind. The men might strike because they were asked to handle the goods of a boycotted or "unfair" manufacturer.

Mr. LITTLEFIELD. The Buck's Stove and Danbury Hat cases were both, I believe, peaceable boycotts.

Mr. EMERY. Both, absolutely. There is nothing in the term "boycott" itself that even suggests or insinuates violence. Violence might occur incidentally to a boycott, but there is nothing in a boycott, any more than in a strike, that connotes violence.

Finally, it would legalize all forms of combinations or contracts between employers and employees to secure satisfactory terms of labor. I do not think the gentlemen realize, when they use such language, that the worst forms of industrial combinations of which we have any knowledge are those where the organization of labor on the one hand, to secure a monopoly of employment for its members, agrees with a combination of employers on the other not to work for any man not a member of the employers' association, while they agree not to employ any man not a member of the union party to the agreement. Thus on the one side the competition of outside contractors or outside dealers is prevented by the fact that the union will not work for any man not a member of the employers' association, and will, of course, strike if any nonunion man be employed; while on the other hand the employers guarantee absolute protection against the competition of nonunion men. Such an agreement is partly illustrated in New York to-day.

Mr. LITTLEFIELD. In what trade in New York?

Mr. EMERY. In the Building Trade Employers' Association of New York. The building trade employers agree not to employ any not members of the union. I do not know that the union, on their part, agreed to work for none not members of the employers' association, but that condition has existed elsewhere, notably in Chicago in the first great teamsters' strike. In that case the Coal Dealers' Association of the city of Chicago had an agreement with the coal teamsters not to employ any but the members of their union, and they agreed, in turn, not to work for any one not a member of the Coal Dealers' Association, with the result that there was no possibility of an outside coal dealer coming into Chicago and selling coal to any of the great store and office buildings, or, to some extent, to the great factories there, because if service were withdrawn other supplies could not be secured, and all sorts of difficulties were met with, during some of which disputes a number of the office buildings were absolutely without coal and, therefore, power and heat. That led finally to a great strike.

In San Francisco similar conditions have existed. The Mill Owners' Association of the city of San Francisco, an association of men owning a majority of the planing mills of that city, entered into an agreement with the millmen's union by virtue of which the millmen's union were to receive a certain advance of wages and an eight-hour day, the consideration for the contract being a promise that the Building Trades Council of San Francisco, a combination of fifty-one unions, agreed not to work on any building material that did not bear the stamp of an eight-hour planing mill. At the time that agreement was entered into, not only were the members of the Millmen's Association of San Francisco the only planing mills in that State on an eight-hour schedule, but there were no planing mills in the United States operated on an eight-hour basis, although there were numerous union mills.

The Union Lumber Company of San Francisco and one or two other planing mills refused to become parties to this contract. As a con-

sequence their lumber was boycotted. Every man they sold to received notice that if he used it in construction, his building would be boycotted; that every endeavor he made to continue operations would be met by sympathetic strikes and boycotts. In several cases, after lumber had been delivered at points distant from San Francisco, the agent of the union followed it and the consignee, being frightened by threat of attack, sent the lumber back from places 70 or 80 miles from San Francisco. In the city of San Francisco the building unions refused to work upon lumber that did not bear the eight-hour stamp and consequently caused strike after strike on buildings where such nonunion lumber was used, but, as an example of the logical outcome of these conditions, there was this incident. The Brunswick-Balke-Collender Company took a contract to lay a bowling alley in San Francisco. The maple flooring was raised and milled in Michigan, there being no maple wood on the Pacific coast. It was finished in a union mill; it bore a union stamp.

Mr. LITTLEFIELD. In Michigan?

Mr. EMERY. In Michigan. It was brought to San Francisco, and not a carpenter or a joiner would lay the flooring until the wood, finished and ready to be laid, had been taken to one of the eight-hour mills and the regular sizing price of \$2 per thousand had been paid for the placing of the eight-hour union stamp on the existing stamp of the nine-hour mill. Then, and not until then, was that flooring laid, and it would have been impossible under industrial conditions that then existed in San Francisco to lay that flooring except under those conditions. That, I believe, was a criminal combination in restraint of trade. They certainly interfered very seriously with the interstate commerce of the Brunswick-Balke-Collender Company. That is but one of numerous incidents that occurred at that time. These combinations went so far in the exercise of autocratic power under that agreement that they began to adopt the language in which autocratic power expresses itself, so that the Building Trades Council "summoned" into its presence dealers in lumber who used the lumber of nonmembers of the combination and "ordered" them—to use their exact words, "You are hereby directed to appear before such and such an organization of the millmen," or "before the Building Trades Council of San Francisco on such a date and show cause, if any you have, why you should not be fined or punished for that violation of this by-law of the Building Trades Council of San Francisco."

I say that under this proposed bill just such combinations, the possibilities of which are only dimly realized at the present time, are legalized, and their activities in restraint of interstate trade would be absolutely without penalty.

Mr. LITTLEFIELD. All of these agreements were peaceable in their character?

Mr. EMERY. Absolutely. I had in San Francisco a canceled check for \$500, a fine paid by a man for using "nontrust" lumber. He paid that to get out from under the boycotts and strikes which would have occurred had he not paid his fine. That combination would be absolutely legalized here, and just conceive for a moment—because the illustration has been previously used, and I do not adopt the name invidiously—a combination between a great corporation and its employees, having for its purpose the attempt to monopolize the market for their particular product. Imagine the possibilities of

a corporation like the United States Steel. They do not need it, perhaps. They are the only producers of steel, it is true.

Mr. LITTLEFIELD. That is not quite correct.

Mr. EMERY. They manufacture 70 per cent of the steel used in the United States.

Mr. LITTLEFIELD. In some parts of it.

Mr. EMERY. And their control over the market is so great that I say that they do not need that. I can well imagine a combination between any of these great corporations, or a combination of great corporations having fifty or sixty or seventy-five or one hundred thousand employees, agreeing to accept the industrial conditions, demand in return for the affiliate aid of the unions to compel the exclusive use of the materials of that corporation. In the absence of a law that would reach a combination of that kind, that could absolutely monopolize a particular field of interstate commerce, competition could be completely destroyed.

Mr. LITTLEFIELD. Your proposition is that that kind of a combination is precisely and in terms authorized by section 3?

Mr. EMERY. Absolutely.

Mr. LITTLEFIELD. And does not depend at all upon registration or certification of the contract?

Mr. EMERY. Absolutely not; indeed, it is a contract that does not have to be registered.

Mr. LITTLEFIELD. Your proposition is that that is expressly authorized by section 3 by the use of the term "peaceable?"

Mr. EMERY. It says "to combine or to contract with each other or with employers for the purpose of peaceably obtaining from employers satisfactory terms for their labor or satisfactory conditions of employment." I say that language, so far as it can, legalizes the very condition I have here described.

Mr. LITTLEFIELD. And then, when it says what you have read, it authorizes the "peaceable," notwithstanding that might be prohibited by common law; that is quite obvious.

Mr. EMERY. Then we are left in the position of finding out what the common law is.

Finally, Mr. Chairman, the whole proposition here, summed up as the chairman has well summed it up time after time, is a proposition to make it lawful for one body of men to do that which is criminal and unlawful for another body of men to do, and that proposition must have been the subject of discussion in the Judiciary Committee of the Senate in 1901. I called your attention to Senator Spooner's remarks on that, when he said he would not be hurried into demagogic action. They were discussing, you will remember, the exception of labor organizations from the Sherman antitrust act provided for in the House amendment; they were discussing that stripped of every other amendment, and even Senator Teller said he would not vote for such an amendment.

Mr. LITTLEFIELD. Inasmuch as section 3 is expressly confined to labor conditions and does not apply to business conditions, what is the reason it is not obnoxious to the combinations expressed in the President's message? He says a discrimination would be unconstitutional. When this is confined to labor conditions only and does not apply to other conditions, why is that not a discrimination and therefore obnoxious to his constitutional proposition.

Mr. EMERY. That certainly seems to be obnoxious not only to his constitutional proposition, but to the constitutional proposition that exists outside of his views on those subjects. I submit, finally—and this is going to be final this time——

Mr. LITTLEFIELD. This is not like Patti's last farewell engagement?

Mr. EMERY. Finally there is this very serious consideration that I think Congress ought to have in mind when asked to enact radical and novel legislation; that the Federal Government is the mirror of good form, legislatively speaking, to the States. At least it does supply the constant models that are followed by State legislatures, so far as experience teaches us. From the time that the Sherman antitrust law was passed, in 1890, every State felt it was necessary to have upon its statute books an antitrust act of some kind or other, and we have had all sorts and forms of statutes, to which attention was called by Mr. Levi Mayer when he said that it occurred to him that the gentlemen who sought immunity under this bill might come under the Federal jurisdiction for immunity, and in doing so would find that they had furnished evidence of their violation of the law in 46 other jurisdictions. If the Congress of the United States places before the people a bill modeled upon class distinctions, making it an offense for one man to do a thing and making it lawful for another man or set of men to do the same thing, if it offers opportunities for immunity, not only for past offenses, but supplies permits for future offenses against trade; if it ever declares in the substantial law of this land an arbitrary distinction between combinations affecting interstate commerce without objective reality and against all experience, asserting that organizations with capital stock have a power to interfere with interstate commerce and voluntary organizations do not have, you can expect every State legislature in the United States to begin to put similar ideas upon their books.

Mr. LITTLEFIELD. They have repeatedly been set aside in the States, legislation of this character, discriminating in favor of laboring men and farmers.

Mr. EMERY. I know that.

Mr. LITTLEFIELD. As a violation of the fourteenth amendment.

Mr. EMERY. We are concerned not alone with the legality of such propositions, but we know that, as a matter of practical experience, whenever bad laws framed upon class considerations and class demands creep on the statute books of the nation they are imitated by the legislatures of the various States, often for political reasons alone. It costs trouble and time to strip unconstitutional measures from the statute books, and in the meantime it has worked a hardship upon many portions of the community. You notice especially that wherever class legislation is demanded and acceded to, when the courts under their oath and under the power conferred upon them, either by the Constitution or the statute, find such class legislation to be unconstitutional and invalid, it increases the resentment of those people in whose favor such legislation has been given and embitters them against the courts. I do not believe it is the intention of Congress or any other legislative body with a due regard for its duty to hastily pass legislation that will be imitated through the country, that will increase the unfortunate disrespect for the courts of our country that is so widely prevalent. So, I say, for that reason Congress ought not to enact such legislation, and it

ought to be particularly careful about the example it sets to the State legislatures. While one of the committees of this House was considering an eight-hour bill which would endeavor, indirectly, to enforce an eight-hour day in private employment, the various State legislatures have considered all sorts of propositions based upon governmental regulation of hours, wages, or working conditions, and in so conservative a Commonwealth as Massachusetts there is recommended a bill which provides that on all public works union labor at union wages shall be exclusively employed. We know that such legislation as that is absurd on its face, but such legislation does actually creep through State legislatures.

Mr. LITTLEFIELD. Do you know any State legislatures through which it creeps with such voluminousness as in the State of Massachusetts?

Mr. MALBY. It has not gone through.

Mr. EMERY. But it has been suggested there.

Mr. LITTLEFIELD. Do you know of any State that is more subject to cases of that kind?

Mr. EMERY. Well Congress has its share of odd suggestions. There is presently before the courts of New York a law not only regulating hours of work on the subject-matter of public contracts, but also that the prevailing rate of wages shall be paid. As the law reads it provides that the standard of the prevailing rate of wages is not that wage rate of the place where the particular work is being done for a municipality or for the State but that of the place where that work is ultimately to be set up, so that if a desk or other requirement for a public school in the city of New York is being manufactured in the city of Rochester, the scale of wages for the artisans engaged on those pieces of furniture must be the rate of wages that would be paid for similar work done in the city of New York. A business man in the State of New York must not only know the prevailing wages in his own neighborhood, but he must know the rate of wages for every conceivable piece of work that may be done for any place in New York, or he can not get his money when his contract is executed. It is legislation of that kind, legislation that has class distinctions as its basis and paternalism as its inspiration, receiving frequent consideration from the Federal Government that excites the action of many State legislatures.

Mr. MALBY. There is one question which I would be pleased to ask you. The claim is made on behalf of the proponents of this bill that the Sherman Act is impracticable in its operations. According to my understanding they do not propose to do anybody an injury, but try to do somebody some good. If this bill does not accomplish that, what affirmative legislation or amendments to that act have you gentlemen to offer? That is our business here; we are trying to find, if there be a condition existing here to which business men object, how can we modify or amend that law so as to relieve the business of the country of conditions which they find are oppressive? For instance, I know that the business men of the country do find it oppressive; you know that they find it oppressive; people are violating the law; they are obliged to violate the law.

Mr. LITTLEFIELD. Said to be.

Mr. MALBY. The president of the Business Men's Association of the city of New York, who addressed us some time ago, said that



almost every business man was violating the law. A man does not like to sleep on a pillow which is stuffed with violations of criminal law. I know of a friend of mine, or two, who are now before the United States grand jury in the State of New York, who are said to have violated the law and are about to be committed for contempt because they do not produce the books of the company and corporation, and so forth. Is there any way to relieve that situation?

Mr. EMERY. I think, if you will permit me, that much of the argument that you suggest on the part of the proponents of this bill is a gratuitous presumption founded upon facts not proven. In all the sessions of this committee, with all the gentlemen who have appeared before it, the conditions which are asserted to be necessary for the conduct of right business and which are alleged to be inhibited by the law as it now stands have not been pointed out in any one practical case; nobody has brought to the chairman of this committee a single case.

Mr. LITTLEFIELD. You might call attention to this fact, that the most conspicuous case now before the country is the alleged conspiracy between the paper manufacturers to control the price of paper. Mr. Lyman, who is president of the International Paper Company, insists there is absolutely no foundation for that. The Attorney-General's office has been engaged for about six months trying to run down the alleged evidence of one Herman Ridder, and up to date without being able to discover any evidence, which may mean that this apprehension exists in apprehension alone. A committee of this House is now digging around and hearing the greatest mass of indirect, immaterial stuff that has nothing to do with the proposition, for the purpose of establishing that apprehension. If the others have that foundation and no more, it does not disturb me, and it does not require any remedy not with the Sherman antitrust law, if they are all like that.

Mr. MALBY. Now, I tell you, my district is interested in paper and pulp wood very extensively.

Mr. LITTLEFIELD. More than mine? Mine is next to yours.

Mr. MALBY. Yes; we are both on the list, I take it, for condemnation.

Mr. LITTLEFIELD. You mean our constituents?

Mr. MALBY. We, incidentally, at least. I do not think they are doing anything at all; I do not think there is any combination, any illegal, any immoral, combination, between the paper men of this country. If they are doing an act which is prohibited by the Sherman law, that law ought to be amended so as to permit them to do exactly what they are doing.

Mr. EMERY. Do you think it is unlawful under the Sherman law, what they are accused of doing?

Mr. MALBY. Of that, of course, I am not prepared to speak, but they are charged with it. I find a constituent of mine arraigned before the grand jury of the State of New York accused of crime, two of them, doing business in my district, about to be committed for contempt. If there is any way to relieve those gentlemen who are progressing with their general business affairs in a business way, I would be very glad to do it if it can be done.

Mr. LITTLEFIELD. But if, as a matter of fact, there do not exist any such facts as are alleged, it does not call for any legislation. If they are able to go on and do their business as they have been doing

it without any embarrassment, and up to date they are not engaged in a combination in restraint of interstate trade, and their business has been managed without any difficulty, it does not call for any amendment of the law.

Mr. MALBY. It does in this respect: These men are constantly accused of crime; it is not a nice thing for a man to defend himself against the charge of crime all the while. He must be relieved from the situation of an atmosphere that charges him all the time with crime; and if there is any way that he can be relieved, I would be abundantly pleased to discover the way and do it, and every business man ought to be in favor of it.

Mr. EMERY. I have just said, in the course of the argument, that I have a right to say that I represent over 60 per cent of the business interests of the country; and if they believe they are doing business under the ban of the law, they ought to be the first to come before your committee and ask relief; they are the largest business interests who have been before this committee, and they are not asking you for any relief of the kind this bill affords.

Mr. LITTLEFIELD. Are any paper manufacturers asking relief?

Mr. EMERY. I have not heard of it.

The following memorandum was received from Hon. Herbert Knox Smith, Commissioner of Corporations:

[Memorandum on H. R. 19745, a bill to regulate commerce among the several States or with foreign nations and to amend the act approved July 2, 1890.]

#### THE COMMON LAW ON RESTRAINT OF TRADE.

A brief consideration of the status of the common law prior to the passage of the Sherman Act is necessary.

First. Combinations in restraint of trade were not criminal. *Conspiracies* in restraint of trade were, indeed, criminal by common law, but this was because of the elements of conspiracy and not because of the element of restraint of trade. A conspiracy in restraint of trade in order to be criminal under common law must have the same criminal elements as any other conspiracy, namely, a combination of two or more to do an unlawful thing or to accomplish a purpose not in itself unlawful by unlawful means.

Second. No damages could be obtained at common law for the injurious effects of a contract in restraint of trade (except in so far as such contract might have also been a criminal conspiracy, as above differentiated from a simple contract in restraint of trade). That is to say, a contract in restraint of trade, even though voidable and unenforceable, had none of the elements of a tort.

The two foregoing points are covered by Taft, J., in the Addyston Pipe case (85 Fed. R., 279), wherein he said: "Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void and were not enforced by the courts," citing *Mogul Steamship Company v. McGregor*, Appeal Cases (1892), page 25, and others.

Third. A contract in restraint of trade at common law was simply not enforceable if reasonable, and this on the ground of public policy.

The earlier decisions usually dealt with specific cases of contracts in restraint of a man's own right to work, but the later cases, decided

under the modern conditions of business, develop the principle much more broadly, and within the last twenty-five years have placed the determination of the question on the matter of the reasonableness and public effect of the contract.

Starting from the early condition, where the question was simply one of the right of a man to contract to refrain from doing certain business over a certain area, up to the recent and modern decisions which involve the question of combination between large interests which may restrain the operations of large amounts of capital and many men, the common law has adhered to the general principle throughout, of the reasonableness of the contract as determined by public policy; that is to say, what is "reasonable under the circumstances;" thus allowing the courts to take into consideration the circumstances in the most insignificant case, or the circumstances which may involve the interests of entire communities and large amounts of capital.

#### ALTERATION OF COMMON LAW BY THE SHERMAN ACT.

The Sherman law did three things: (1) It enlarged the scope of the common-law provisions so as to include contracts and combinations in restraint of trade without regard to the reasonableness thereof and made these combinations and contracts civilly illegal, unenforceable, and enjoined; (2) it made such contracts and combinations criminal; and (3) it gave to private parties the right of treble damages for injury caused by such combination. These last two features were a reversal of the common law, for restraint of trade was not a crime at common law, nor was there any right of damages. The rest of the Sherman law is matter of enforcement.

#### DEVELOPMENT OF THE SHERMAN LAW.

Court decisions have settled several important points in this act since its passage.

(1) It covers *all* contracts and combinations in restraint of interstate trade, whether they be reasonable or unreasonable, the courts expressly recognizing at the same time that this distinction was a part of the common law and that the Sherman law abolished it.

"The language of the act includes *every* contract, combination \* \* \* in restraint of trade or commerce among the several States. \* \* \* We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by the act." (U. S. v. Trans-Missouri Freight Association, 166 U. S., 312.)

"When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress." (U. S. v. Joint Traffic Freight Association, 166 U. S., 328.)

"That the act is not limited to restraint of interstate and international trade or commerce that are unreasonable in their nature, but

embraces *all* direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce." (Northern Securities Co. v. U. S., 193 U. S., 331.)

Hardly anything can be less subject to question than the fact that the Trans-Missouri decision of the Supreme Court in 1897 and those following it recognized this change and recognized it also as changing the well-established distinction of the common law between reasonable and unreasonable restraint of trade.

(2) The law was held to include railroads.

"The conclusion which we have drawn from the examination above made into the question before us is that the anti-trust act applies to railroads." (U. S. v. Trans-Missouri Freight Traffic Association, 166 U. S., 341.)

The act was also applied to railroads in United States v. Joint Traffic Association (171 U. S., 505) and in United States v. Northern Securities Company (193 U. S., 197.)

(3) The law was held to include labor unions for certain purposes. (U. S. v. Workingmen's Council of North America, 54 F. R., 994 (1893), affirmed, 57 F. R. 85; Waterhouse v. Comer, 55 F. R., 149, 157; in re Debs, 158 U. S., 564, 599, and others; Loewe v. Lawlor, the Danbury Hatters case.)

(4) The Knight case (U. S. v. E. C. Knight Co., 156 U. S., 1), frequently misunderstood, is simply referred to here by way of explanation. This case merely determined that production and manufacture, per se, does not constitute interstate commerce, affirming the well-known doctrine on the subject already announced in Kidd v. Pearson (128 U. S., 1) and Coe v. Errol (116 U. S., 517), and under which, a combination of a number of sugar refineries in a certain State for the production of sugar was held not to be a combination in restraint of interstate trade.

#### CHANGE OF POLICY.

From the foregoing it will therefore be observed that a distinct change of public policy took place with the enactment of the Sherman law. Prior to that law it was left to the courts to determine what amount or nature of such restraint rendered the contract contrary to public policy, in other words, unreasonable and therefore unenforceable. The common-law validity of the contract was based wholly on public policy. The Sherman law took this determination out of the hands of the court, and stated conclusively that the public policy was to be, namely, that *all* restraint of interstate trade was against public policy. Having thus made illegal all contracts and combinations in restraint of such trade, it then added to the degree of such illegality, and to the liabilities arising therefrom, by making such contracts and combinations illegal, enjoinable, criminal, and allowing a private cause of action for treble damages.

It is with this question of public policy so established by the Sherman law that the bill under consideration primarily deals.

#### NEED FOR FURTHER CHANGE IN PUBLIC POLICY.

The Sherman law was an attempt to regulate interstate trade by a sweeping declaration of public policy, with drastic measures for

enforcing the policy so declared. Eighteen years of experience with this law and the policy which it established have demonstrated the need for further action on this great subject-matter. Much good has been accomplished by the Sherman law, especially in bringing the entire question of combinations to public attention, and thus in helping the growth of a strong and intelligent public opinion thereon.

But there is now need for an advance in policy. As a measure of regulation of interstate commerce for the public good, the Sherman law has been found to be defective, in many cases harmful, and too wide in its prohibitions.

Furthermore, as a measure of regulation this law is of necessity defective, because, unlike most Federal laws dealing with the great and intricate subject of commerce, it is applied solely by the action of the court and not through any administrative office or body. Suppose the Steamboat Inspection Service, regulating vessels, was left to occasional court actions instead of the broad and effective system of administrative regulation which we now have throughout the country. Suppose a similar situation with the administration of the interstate commerce law or the Immigration Service. The expediency of such a course in those cases is obvious, by experience; yet such is the policy of the Sherman law, which deals with interests as vital and of far greater extent. It is largely for this reason that the Sherman law has failed to accomplish that regulation of great combinations and corporations which was undoubtedly the motive for its passage. Its application is necessarily only occasional, uncertain, and easily evaded, and it is not too much to say that, far from preventing combination, the Sherman law has forced an extreme degree of combination under legal forms especially adapted to the evasion of that law.

It has become clear that while the prohibition of certain forms of combination is still necessary, there is far greater necessity for effective administrative regulation of combinations.

The decided trend of public opinion in the last few years makes it certain that the country must advance to the position of allowing a certain degree of industrial combination, recognizing that such combination is a modern necessity of trade. But the country properly will not tolerate the idea of allowing such combination in interstate commerce unless such action is bound up with a feasible system of regulating this interstate commerce in the interests of the public. The two must go together.

"The law should correct that portion of the Sherman act which prohibits all combinations of the character above described, whether they be reasonable or unreasonable; but this should be done only as a part of a general scheme to provide for this effective and thorough-going supervision by the National Government of all the operations of the big interstate business concerns." (President's message, January 31, 1908.)

The bill under consideration is drawn to accomplish these essential purposes.

#### ANALYSIS OF THE BILL.

Three objects of primary importance appear in this bill:

First. The securing of a very complete degree of information as to the operations of great interstate corporations.

Second. The allowing of industrial combination so far as the same is not contrary to public policy and public interest, or, in other words, is reasonable.

Third. The providing for a certain degree of administrative action as to such combination.

Based on these three propositions, the bill provides a working system which is wholly voluntary in its method. No corporation is in any way compelled to avail itself of this bill. There are great advantages in such a voluntary system. There are innumerable small corporations which, although engaging technically in interstate commerce, yet are of no public interest whatsoever. These would necessarily be brought under the working of any *compulsory* system of information. The result, as to them, would not only be burdensome, but also useless for any public purpose. Furthermore, a compulsory system would at once raise a number of difficult constitutional questions and require years of litigation to determine the rights connected therewith. All these practical difficulties are avoided by the voluntary system of this bill, and a tendency to cooperation rather than toward opposition is thereby fostered.

There is no penalty for refusing to give information. Corporations so refusing simply do not come under the act, and remain exactly in the same position as they are to-day. These smaller concerns simply will not register under the law, because their operations are not of sufficient importance to invite attack under the Sherman law.

Any industrial corporation engaged in interstate commerce, by voluntarily furnishing certain information, may obtain registration under this bill through the Commissioner of Corporations. Such registration is merely a ministerial act on the part of the Commissioner, who, upon the conditions being fulfilled, *must* register the company, and has no discretion therein. He has, however, discretion for the cancellation of registration upon the three grounds named in the bill, but from this action there is an appeal to the supreme court of the District of Columbia.

The details of information to be furnished as a condition of registration are to be prescribed by regulations established by the President, it being felt that the information could be gotten best in this way, by a flexible system of regulations, rather than by stating the details in the law itself of the information desired. The scope of such regulations is, however, limited to the four subjects named in the bill.

#### AMNESTY FOR PAST ACTS.

In view of the indefiniteness and the sweeping character of the Sherman law, it is best, in establishing the new system proposed under this bill, to apply to past combinations and acts substantially the same principles as are to be applied to the future combinations, because it is recognized that the business of the country has already in large part gone through a period of combination. For this reason the bill provides that registered corporations shall not be prosecuted under the Sherman law for existing and past combinations which are reasonable, and furthermore, the bill provides a short period of limitation for all prosecutions under the Sherman law against all combinations, to wit, one year after the passage of this act. So

many combinations have already been entered into that it would be unfair to leave these past combinations at the mercy of the original unmodified act, while applying the test of reasonableness to future combinations only.

POWER OF THE COMMISSIONER UNDER SECTION 10.

Having thus established the status of the past, the bill provides for the future in section 10, a section which has been subject to considerable misapprehension and which merits serious consideration.

In substance, this section provides that any person or registered corporation about to enter into a contract *may* submit the same to the Commissioner of Corporations. If the Commissioner does not, with the concurrence of the Secretary of Commerce and Labor, disapprove it within thirty days thereafter, no suit can be brought by the United States under the Sherman law on account of that contract unless the prosecuting officer can prove the contract to be unreasonable. Several points are to be noted here:

(1) The action of the Commissioner is simply that of disapproval or failure to disapprove—a purely negative action. He is not required to approve. Unless he disapproves within thirty days, the contract can only be attacked if in unreasonable restraint of trade.

(2) The phraseology of the bill has led apparently many to believe that the Commissioner is here given the power to make a judicial finding. This is not so. The Commissioner, it is true, may disapprove the contract. The only question is, What is the effect of such disapproval? The sole effect of such action is to leave the contract as it is now under the present Sherman law. For that particular contract the Sherman law will remain in full force. This is the sole and entire effect of any action the Commissioner may take under this section of the bill. His disapproval does not make the contract unreasonable, does not make it void or illegal, is not binding upon any party thereto, and has none of the effects of a judicial finding. The sole effect is to leave that particular contract just where it is to-day.

If, on the other hand, the Commissioner takes no action on the contract, the bill itself operates automatically on that contract, and thereafter the prosecuting officer of the Government must prove that the contract is unreasonable in order to maintain suit on it under the Sherman law. The extent of power granted here and the effect of the Commissioner's disapproval is very limited, and has no resemblance to a judicial determination of facts. His disapproval has the simple result of leaving the contract exactly where it is if the bill should not be passed; that is, does not change the present status at all. The only change would occur when he takes no action at all. In such cases the bill itself then operates automatically to relieve the contract from certain liability.

While this power is extremely limited, it is believed to be very desirable for the accomplishing in a legal and definite manner that which must be done in some way under any statute limiting restraint of trade. That is to say, the course of modern business is so widely affected by the Sherman law, and in such an indefinite way, that for any safe conduct of ordinary commercial operations it is essential

that there should be some power given to the executive branch of the Government to indicate beforehand what its attitude will be as to a proposed combination. Section 10 will allow the business man who proposes to make a given contract to lay the matter before the executive branch of the Government and ask them beforehand how it will be viewed. Within thirty days he will thus find out either that his contract is believed to be contrary to public policy and may be attacked by the Government, in which case he would thereafter enter upon it at his own very proper risk, or he would learn, on the other hand, that the Government saw no *prima facie* reason to disapprove it, and he would then know that he could go ahead and base his operations upon it, and that so long as it was not against public policy it could not be attacked under the Sherman law; and that would be all the average business man would care to know. In practice there are continual applications on the part of business men to the executive branch to know whether such and such proposed transactions are criminal or not. At present the executive can make no satisfactory answer. It can only say to the business men: "We can tell you nothing; if you act you must take your chances." It is obvious that under a law so sweeping and drastic as the Sherman law business men are put at an extremely unfair disadvantage in carrying on ordinary modern transactions. It should be so that the Government can, by legal and regular methods, make its election as to the kind of contract which it will prosecute or will not prosecute, and be able so to advise the parties to that contract that they may act upon definite knowledge.

In essence this section provides merely a regular procedure, available for all parties, for exercising that discretion as to enforcement of law which is an inseparable part of administrative functions. While it is the duty of the administrative to enforce the law, it is inevitable that certain powers of discretion and selection belong to the enforcing officer.

"Moreover, it is of course impossible that all of the law could always be enforced at once. Indeed, that is an elementary fact in administration, not often appreciated, that in administration it is always a question for the executive department what laws shall have enforcement, what laws shall not, or, at least, to the enforcement of what laws shall the Government direct its best efforts and first attention, and what laws shall by that process of procedure have a secondary enforcement. At all events, the executive department should have a free hand in this matter, and it gets that freedom for the exercise of its discretion from this condition of the law." (Wyman's Administrative Law, par. 11.)

An appeal is allowed to the supreme court of the District of Columbia from the cancellation of registration, because such cancellation partakes of the nature of a quasi judicial act (of a sort frequently given to administrative officers) and calls for the exercise of discretion on the part of that officer, affecting the entire status of the given corporation.

No appeal lies from the finding or disapproval on the part of the Commissioner under section 10, for the reason that such finding is not in any sense judicial, but simply affects the action of the prosecuting officer, a matter within the administrative jurisdiction; and, further-



more, the effect of this finding is primary only, because no specific rights are thereupon determined, and no final action is taken and none can be taken until prosecution takes place in the regular judicial tribunal, at which time a judicial determination, of course, will be reached.

#### CORPORATIONS AND ASSOCIATIONS OTHER THAN INDUSTRIALS.

Slight differences in the treatment of corporations and persons other than industrial corporations appearing in the bill require some special notice.

The contracts of railroads are required to be filed with the Interstate Commerce Commission, as such matters are peculiarly within their jurisdiction, and no reports are required from railroads, because that subject-matter is already thoroughly covered in the interstate-commerce act.

Again, a slight difference of treatment, equally due to difference of subject-matter, appears in the case of corporations and associations not for profit and without capital stock, which would include, among others, labor unions, farmers' organizations, granges, and various voluntary and mutual associations. No such degree of information is required from these sources, because they do not have it to furnish, being, as above stated, without capital stock and not for profit, and yet also being probably within the purview of the Sherman law and fully as entitled as anyone else to make reasonable combinations for their own benefit.

Particularly in the case of labor unions is it necessary to allow reasonable combination under such bill. No sensible man desires either the abolition or restriction of the right of the workingman to combine to improve his condition, so long as he does so by proper and lawful means. Any state of law which makes such combination illegal per se is peculiarly intolerable and contrary to public policy. If from the recent decision of the Supreme Court in the case above cited, *Loewe v. Lawlor*, the so-called "Danbury Hatters case," such condemnation of this fundamental right to combine may be deduced, it would illustrate this suggestion forcibly.

A further incidental feature of the bill is the change in the seventh section thereof, eliminating the allowance of treble damages. This was a purely statutory provision; it never existed at the common law, and there is no reason why any such exceptional rule should be applied to this particular tort, as distinguished from the ordinary rule in civil actions.

The provisions of section 3 of the said bill, page 7, lines 24 and 25, and page 8, lines 1 to 10, were intended and believed simply to safeguard the generally acknowledged right of employees to cease from working, by means of strike or otherwise, and of employers to discharge workmen, and the right of either of these parties to combine for the obtaining of satisfactory terms of employment. This is not intended in any way to legalize either the boycott or the blacklist. If it does so, it should be amended to prevent any such result.

Certain basic legal questions are connected with the general principles of this bill, which here require brief discussion.

## RIGHT TO REQUIRE INFORMATION.

The bill, being wholly optional, does not present any way in which this constitutional question can be raised by court proceeding. Nevertheless, it is one of the prime objects of the bill to secure information, and therefore the right of the Federal Government to such information should be referred to.

It is believed that there is a clear right to such information concerning corporations engaged in interstate commerce as is provided for in the bill. The subject is substantially covered by the following cases, in which the right of the Interstate Commerce Commission to certain classes of information was contested, and in which the right of the Government to information from carriers engaged in interstate commerce was broadly sustained.

*I. C. C. v. Baird*, 194 U. S. 25, p. 44; *I. C. C. v. Brimson*, 154 U. S., 481 et seq.; *I. C. C. v. Railway Company*, 167 U. S., 479, at page 506; *In re Pacific Ry. Com'n*, 32 F. R., 241, 250; *T. P. Ry. Co. v. I. C. C.*, 162 U. S., 197, 212-233.

The broad powers of the Federal Government to inquire into the affairs of an industrial company engaged in interstate commerce for the purpose of regulating such commerce are covered most recently and conclusively in the case of *Hale v. Henkel* (201 U. S., 75).

In the case of *Interstate Commerce Commission v. Baird* (194 U. S., 25) the Commission requested the production, for inspection, of certain contracts and the witnesses refused to permit them to be given in evidence. The circuit court held the contracts to be irrelevant, upon the ground that they related solely to intrastate transactions and had nothing to do with interstate commerce. The contracts related to the sale of coal in Pennsylvania. It was held by the Supreme Court, reversing the circuit court, that the railroads being all engaged in interstate commerce, the Commission was lawfully authorized by law to inquire into their affairs and methods of doing business.

"The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and in that way to obtain full and accurate information of all matters involved in the enforcement of the act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. \* \* \*

"Upon the ground that they pertained to the manner of conducting a material part of the business of these interstate carriers, which was under investigation, we think the Commission had a right to demand their production."

A very important distinction was made in this case with regard to the right of the Government to require information, which distinction has become all the more significant in view of the recent decisions in the *Adair* and *Howard* cases (*Adair v. U. S. Supreme Court Jan.*

27, 1908; *Howard v. Ill. R. R.*, same, Jan. 11, 1908). At page 43 of the *Baird* case the court said:

"It is to be remembered in this connection that we are not dealing with the ultimate fact of controversy or deciding which of the contending claims will be finally established. This is a question of relevancy of proof before a body not authorized to make a final judgment, but to investigate and make orders which may or may not be finally embodied in judgments or decrees of the court."

The disinclination of the court to draw any hard and fast lines as to the precise character of the information which may be sought for is disclosed in the following words of the court:

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof."

*I. C. C. v. Ry. Co.*, 167 U. S., 479, at page 506:

"It (the Commission) is charged with the general duty of inquiring as to the management of the business of railroad companies and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business."

*I. C. C. v. Brimson*, 154 U. S., 447, at page 474:

"An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling, by all lawful methods, obedience to such rules."

The entire argument for the existence of this power can well be rested on the above quotation.

In *re Pacific Railway Commission* (32 Fed. Rep., 241): In referring to the Pacific Railway Commission created by act of Congress March 3, 1887, it was said at page 249 that it was a mere board of inquiry directed to obtain information upon certain matters and report the result of its investigations to the President, who is to lay the same before Congress.

And referring to the inquiries required in the taking of the census, the court in this case said:

"And in addition to the inquiries usually accompanying the taking of a census, there is no doubt that Congress may authorize a commission to obtain information upon any subject which in its judgment it may be important to possess."

As to industrial corporations, see *Hale v. Henkel* (201 U. S., 75):

"It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchises from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It not intended to intimate, however, that it has a general visitatorial power over State corporations. \* \* \* Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the fourth amendment."

The recent case of *Howard v. The Illinois Central Railroad*, decided January 11, 1908, in the Supreme Court, holding the employers' liability law unconstitutional, employed certain language which has been referred to as limiting the power of Congress in regulating interstate commerce.

"From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates as they engage as common carriers in trade or commerce between the States, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce."

And further the court says:

"It remains only to consider the contention which we have previously quoted that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it."

In *Adair v. United States*, decided by the Supreme Court January 27, 1908, referring to the *Howard* decision it was stated:

"Manifestly any rule prescribed for the conduct of interstate commerce in order to be within the competency of Congress under its power to regulate commerce among the States must have some real or substantial relation to, or connection with, the commerce regulated."

There is a clear distinction between the principle upon which the *Howard* case proceeds, and the right of the Government to certain classes of information from those engaged in interstate commerce.

The Howard and Adair cases involved a final property right, concerned in the relationship of employer and employee. It was obvious that certain forms of that relationship might have no connection with interstate commerce.

On the other hand, it is equally obvious that the information specified in this bill may, and will always, be directly relevant to interstate operations, and further that the securing of this information is not a final or conclusive determination, but merely a primary and preliminary step. To requote from the Baird case (*supra*):

"It is to be remembered in this connection that we are not dealing with the ultimate fact of controversy, or determining which of the contending claims will be finally established. This is a question of relevancy of proof before a body not authorized to make a final judgment, but to investigate and make orders which may or may not be finally embodied in judgments or decrees of the court."

Thus the question is one of relevancy to the subject-matter of interstate commerce. All the information provided for in the bill is obviously so relevant.

Furthermore, the practice for eighteen years fully sustains this general power. Sections 12 and 20 of the interstate commerce act require very complete information from railroads, and so far as is known, have been enforced and obeyed, with hardly a protest from the railroad companies, and have been expressly sustained in the *Brimson* and *Baird* cases (*supra*).

Innumerable further instances of the sweeping power to secure information appear in the uniform appropriation policy of Congress as applied to all manner of investigations, scientific, agricultural, educational, and statistical, so long carried on. The very broad investigatory powers of the Commissioner of Corporations have been constantly exercised for over four years in connection with industrial corporations, and have not been contested in a single instance.

#### LEGAL BEARING OF THE WORD "REASONABLE" IN CONNECTION WITH RESTRAINT OF TRADE.

The use of the word "reasonable," or of the phrase "unreasonable restraint of trade," as it appears in the bill, raises certain important legal questions, possibly the most important in the bill. These questions are:

(1) Is the phrase "unreasonable restraint of trade" sufficiently defined by court decisions, supplemented by economic principles, to afford a proper basis for the administration of the proposed act?

(2) Is this phrase sufficiently definite in meaning so that it may be used in an act which is in part criminal and penal, without resulting in making void indictments thereunder because the crime is not sufficiently defined in the statute?

Taking up the first point, reference is made to preceding quotations and citations herein, introduced for the purpose of showing that the *Trans-Missouri* case in the Supreme Court established the principle that the antitrust law applied to all combinations in restraint of trade, whether reasonable or unreasonable, and in these very decisions recognized this principle of common-law distinction.

It is of course well settled that—

“When Congress adopts or creates common-law offenses, the court may properly look to that body of jurisprudence for the true meaning and definition of such crimes, if they are not clearly defined in the act creating them.” (In re Greene, 52 Fed. Rep., 111.)

The definition of this phrase has been set forth in a vast number of cases. The general principle laid down very early by Chief Justice Tyndall has been cited again and again as applying to modern conditions.

Section 24, American and English Encyclopedia, 650:

“And in deciding whether or not a given restraint is reasonable, the courts have universally adopted the test laid down in the leading case by Chief Justice Tyndall:

“‘We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether or not the restraint is such a one as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; and, if oppressive, it is in the eye of the law unreasonable.’” (Horner v. Graves, 7 Bingham, 743.)

Quoted with approval by Judge Taft in *U. S. v. Addyston Pipe Co.* (85 Fed. R., 282.)

Mr. Justice Peckham, delivering the opinion of the court in the *Trans-Missouri* case, said:

“Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature.”

And Mr. Justice White, who delivered the opinion in which the four dissenting justices concurred, said:

“It is unnecessary to refer to the authorities showing that, although a contract may in some measure restrain trade, it is not for that reason void, or even voidable, unless the restraint which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine.”

One of the few propositions upon which the entire court agreed was on the common-law distinction between reasonable and unreasonable restraint of trade.

As early as *Mitchel v. Reynolds* (supra), in the year 1711, we find reasons given for refusal to enforce such contracts, as follows:

1. The mischief which may arise to the party by loss of his livelihood.

2. To the public by depriving it of a useful member.

3. The great abuses these voluntary restraints are liable to from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible.

In another court case upon this subject, *Alger v. Thacher* (19 Pick., 51), the court stated forcibly the considerations of public policy involved.

"(1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market."

"An agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it." (*Navigation Co. v. Winsor*, 20 Wall, 64.)

Summing up the *Maxim-Nordenfelt* case (App. Cas., 535), Mr. Justice White, dissenting in *Trans-Missouri* case (166 U. S., 347), said:

"The matter was finally set at rest by the House of Lords in *Nordenfelt v. Maxim-Nordenfelt Co.* \* \* \* In this case it was held that \* \* \* whether a contract was invalid because of restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable."

"The line \* \* \* between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions." *U. S. v. Trans-Mo. Assn. (C. C. A.)*, 58 F. R., 67; approved in *Dueber Watch case*, 66 Fed. R., 643 (C. C. A.).

The general principle of reasonableness, though at first applied to contracts which were of very narrow scope, and where the restraint was ancillary to a different purpose, has, in the course of business development, been found equally applicable to contracts of far greater importance and scope, and in no sense subsidiary or ancillary.

Most of the early decisions dealt with contracts whereby a man "contracted himself out of business," usually in connection with the sale of that business to some one else. The distinction, therefore, has at times been suggested in the course of argument that such contracts as may be referred to as ancillary may be reasonable, but that contracts which are not ancillary, but whose main or sole purpose is the restriction of competition, can not in any case be held reasonable at common law.

This distinction is not borne out by the cases or by general principles. First, as to general principle. It is hard to see how any restriction can be more complete or more entirely suppress competition, so far as the person making the restriction is concerned, than a contract where a man agrees to *entirely cease* to work at a certain business. If there is any merit in the suggestion that has been made in several cases, namely, that contracts which *regulate* competition are proper while those which totally suppress competition are improper and unlawful, it would seem that such "contracting out of business" is of the unlawful sort. It has, nevertheless, been sustained for several centuries. On principle, therefore, it would seem that if such a contract for the complete suppression of competition can be sustained,

it would be proper to sustain a contract where the restriction only goes to a certain amount of the competition, as toward the regulation of prices, the amount of the output, methods of selling, etc., where the competition is by no means completely suppressed, but is merely regulated.

Taking up the cases on this question, there have been a number of well-considered decisions holding contracts in restraint of trade to be lawful which were not in any sense ancillary. In fact, very few, if any, cases exist where the decision is expressly based on any distinction between ancillary and nonancillary contracts.

The first report given on the subject in the Yearbook involved the sale of a dyeing establishment, with the further agreement that the vendor should not go into the dyeing business on that street in London for six months. The severity with which the courts handled cases of this kind is shown by the fact that this contract, which would, beyond all question, be sustained to-day, was held void, the judge remarking that if the plaintiff were in court he would go to prison until he paid a fine to the King.

"There was an early period in English history when the courts set their faces against all restrictions upon trade alike, whether limited or unlimited. This period has long since passed away." (*Maxim-Nordenfeldt v. Nordenfeldt*, L. R. (1893), ch. 630, 651.)

Judges as far back as the reign of Henry V, and certainly during the reign of Queen Elizabeth, appear, as has been already stated, to have considered that even contracts in partial restraint of trade were uniformly void in law.

"But, as trade progressed, it was necessarily discovered that a doctrine so rigid must be injurious to the State itself. In the same way, and at about the same date, by-laws which were in mere regulation of trade came to be distinguished from those which were in unlimited restraint of it. \* \* \* One reason for the adoption of a more elastic doctrine appears from the judgment delivered in *Broad v. Jolyffe* (Cro. Jac., 596). \* \* \* The courts, yielding to the progress of industry and commerce, finally decided that a man might restrain himself voluntarily and upon valuable consideration from using his trade in a particular place." (*Monopolies and Industrial Trusts*, Beach, p. 22.)

By later statutes there was an enlargement of the power of combination between workman and workman and between master and master for the purpose of maintaining and enforcing their respective interests and to remove the objection of being in restraint of trade, to which some of the combinations had been obnoxious. (34 and 35 Victoria, chs. 31 and 39, and 40 Victoria, ch. 22.)

The law upon this subject in this country has followed somewhat the development in England, but it has not been confined by technical limitations established in that country. A court of equity in this country will inquire "not whether the restraint extends to an entire State or nation, but whether it is a reasonable and proper protection of the party in whose favor the covenant is made, and whether it is prejudicial to the public interests." (*Monopolies and Industrial Trusts*, Beach, p. 28.)

*Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. D., 598.

This case is important for the present consideration from two points of view. First, because it represents a combination with no element



of an ancillary contract, and, secondly, shows a remarkable development from the old dyer's case several hundred years prior, which change is due to the comprehensive development of the principle of combination in business which has taken place.

This case sustains as legal certain acts creating monopolies, for the increasing of or maintaining of prices, that had previously been held illegal and void. The acts complained of were restrictive contracts granting to merchants a rebate of 5 per cent on freights should they send all their freight from China by the combined lines. It was held that the association being formed by the defendants with a view of keeping the trade in their own hands, and not with the intention of ruining the trades of the plaintiffs, or through any personal malice or ill will toward them, was not unlawful, and that no action for conspiracy was maintainable.

It has been held that an agreement to parcel out among the parties to it the stevedore business of a port, and so to prevent competition among the parties and to keep up the price of the work, is not necessarily invalid if carried into effect by the proper means. (*Collins v. Locke*, 41 L. T., N. S. 292.)

"It is perfectly lawful for the owners of three quarries to agree that they will sell their commodities upon terms suitable to themselves, and which they approve of; and although they know that the purchaser is going to supply, or offer to supply, the corporation of Birmingham with the commodity, that does not in the least restrict their right to deal inter se nor does such dealing deserve to be characterized as a conspiracy. There is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leaving one of them to make any other profit that he can." (*Jones v. North*, L. R. 19 Eq., 425.)

*Fowler v. Park*, 131 U. S., 88.

This case involved a contract not ancillary in its nature. The agreement provided that the parties should enjoy a monopoly of the sale of a patent medicine within a defined region in the United States, and provided further that the medicine should not be sold below a certain rate or price. It was held that this contract was not unreasonable or invalid as in restraint of trade.

*Wickens v. Evans*, 3 Younge and J., 318.

This case involved an agreement between these persons engaged in the manufacture of trunks and boxes; they divided up the territory of England into three parts and agreed that each would not go into or send into the territory of the other two, nor suffer any goods manufactured to go out of his reserved territory. They further agreed not to assist any person who opposed all, or any, or either of the parties; nor to purchase any tea chest or chests at a higher price than 6 pence or 8 pence each. They further agreed that in case any opposition should appear to them, they would combine together for mutual and beneficial protection; that they would not act prejudicial to the interests of each other but aid and assist each other in every way possible.

This contract for the division of territory was not an ancillary contract. It was sustained by the court.

In the opinion, Vaughan, B., stated: "In my opinion this was an honest and upright contract, which has been the question in all the

cases; and a contract by which the parties are not injured, as they may be supplied on easier terms."

*Wiggins Ferry Company v. Chicago and Alton Railroad Co.*, 73 Missouri, 389.

In this case the ferry company had by its charter an exclusive right to ferry all freight between St. Louis and the company's lands on the opposite Illinois shore. A contract was entered into with the railroad company by which the railroad company agreed that it would always employ the ferry company in transferring persons and property across the river. A clause in the contract declared that the object of the ferry company was to secure to itself the ferrying business between the Illinois and Mississippi shores of all freights and passengers carried by the railroad company.

It was held that this contract was not void as being against public policy, nor was it void as being in restraint of trade. Contracts are held void on this ground only when they operate a general restraint of trade. "This contract was limited in its operation to a single place, and at that place did not wholly prohibit the ferrying business, but only limited it to one company."

*Skrainka v. Scharringhausen*, 8 Mo. App., 523.

In this case, 24 persons, owners and operators of stone quarries in a section of St. Louis, agreed that in view of the great competition existing, with a tendency to depress the price of building rock so as to make it impossible to work quarries at a profit, it was desirable to agree on a plan which would secure a fair proportionate sale of the product at uniform prices and living rates. The contract provided that none of the subscribers would, for a period of six months, sell any building stone or product of any quarry in St. Louis south of a fixed line, except as set forth in the agreement; an exclusive agent was appointed to sell on account of the contracting parties the stone of said quarries, giving each quarry its proportionate share, taking into consideration its location and producing capacity. The price of the rock was set out in the instrument. A supervisory committee of five was provided to see that the agent dealt fairly with each quarry, to adjust prices, and hear complaints. The sum of \$100 damages was fixed as liquidated damages for each violation of the agreement.

The defendant was sued for \$100 damages in violation of the agreement. There was no dispute as to the facts, the appellant contending that the agreement was against public policy.

The court said: "We are of opinion that the agreement in the present case is not one which clearly upon its face is mischievous and which ought to be declared void with a view to protecting individuals or the general public." The court further stated that they knew of no case in recent times in which a contract such as the one above had been declared illegal.

*Manchester, etc., R. Co. v. Concord R. Co.* (N. H.), 20 Atl. Rep., 383.

In this case one railroad company was under a contract to use the roadbed, rolling stock, and equipment of another railroad company, which was its rival and competitor. The contract was made for the purpose of preventing competition, but not for the purpose of raising prices of transportation above a reasonable standard. There was a statute, act of New Hampshire, July 5, 1867, forbidding the consolidation of competing railways and rendering illegal any contract

whereby the roadbed, rolling stock, and equipment of one competing line is to be operated and controlled by another. This was pleaded in defense to a bill in equity for an accounting and return of consideration to plaintiff, whose property and equipment passed to the defendant under the contract.

The contract was held not to be void as against public policy.

See also *Chic. R. R. v. Pullman Co.*, 139 U. S., 79 (Pullman car exclusive contract); *Express cases*, 117 U. S., 1; *Stock Yards Co. v. Keith*, 139 U. S., 128.

*Gibbs v. Consolidated Gas Company of Baltimore*, 134 U. S., 396.

This case involved an agreement between two competing gas companies in the city of Baltimore wherein they agreed to enter into an arrangement each with the other whereby the business of each might be conducted in a more profitable manner than at present. It seems that in this case, by a special statute, contracts of this character between public service companies were inhibited and declared, by positive terms, to be utterly null and void, and the court refused to enforce the terms of the contract. But the court, through Chief Justice Fuller, makes the reservation that contracts of this character which are not against public policy are free from objections and may be enforced.

Finally, the circuit court of appeals' decision in the *Trans-Missouri* case, completely supports the argument as to the broad use of the word "reasonable." This is the leading case on the subject, as of course the decision of the Supreme Court in this same case eliminated the question of reasonableness altogether and ended discussion of the matter after 1897.

In this decision the circuit court of appeals proceeded throughout on the broad use of the phrase "reasonable restraint" with no distinctions as to ancillary contracts, but solely with reference to the relation to general public policy.

Thus an examination of the cases shows that about one-third of those collected on the subject held valid contracts which were not ancillary. It must be remembered that such a class of contracts has only become frequent in very modern times, so that by far the greater number of decisions would naturally have to do with those earlier contracts which were, by the very restricted nature of ancient trade, ancillary in their character. Had there been a long course of decisions applied to modern conditions, as there has been to ancient conditions, we would undoubtedly have had an equal or far greater number of decisions following this modern principle, upholding certain contracts in restraint of trade as reasonable, although not in any sense ancillary.

#### IS THE PHRASE SUFFICIENTLY DEFINITE.

The second question in connection with the use of this phrase "reasonable restraint of trade," is whether it imports an element of undue uncertainty into a criminal statute.

As pointed out in the cases cited above, the words have been largely construed in a great number of cases and over a long period of time. It should be further pointed out also that as a practical consideration the antitrust law, though criminal in part, has been chiefly applied as a civil statute. Practically all of the great cases more recently tried under this law have been by bill in equity and injunction. Very few,

if any, criminal cases have ever been successfully brought to the issue of conviction under this law, as compared with hundreds of civil cases so successfully tried. As a practical question, therefore, this objection to the use of this phrase is relatively very unimportant. The objection will apply only in case of a criminal application of the law, and this criminal application, judging from the past, is quite infrequent.

As a legal consideration, also, the insertion of this phrase does not add to the indefiniteness of the present statute to such an extent as to be open to the objection referred to. Absolute certainty is not a prerequisite of a criminal statute, but simply such a degree of certainty as is reasonably possible in the description of the subject-matter.

The only case at all analogous which is opposed to this view is that of *United States v. Tozer* (52 Fed. R., 917), where it was held that there can be no conviction under the provisions of an act prohibiting undue preference in a case where the jury is required to determine whether the preference is reasonable or unreasonable.

*Elliott on Railroads*, a respectable authority, volume 4, page 723, states that this doctrine is opposed to that asserted in other cases.

In the case of *United States v. B. and O. Railroad* (153 Fed. R., 997) the railroad was indicted under the same act for practicing unreasonable discrimination, and the indictment was held bad for not showing the *particulars* of the alleged unreasonable and unjust discrimination, but no such objection was raised to the act itself as was raised in the *Tozer* case.

In the case of *Czarra v. Board of Local Supervising Inspectors of the District of Columbia* (25 App. D. C., 443) the medical practitioner was convicted under the act of Congress approved June 3, 1896, of "unprofessional and dishonorable conduct." The point considered by the court was whether these words were sufficient to satisfy the sixth amendment, which preserves the right of the accused in all criminal prosecutions to be informed of the nature and cause of the accusation against them. In this case the court said:

"This obvious duty must be performed by the legislature itself, and can not be delegated to the judiciary. It may doubtless be accomplished by the use of words or terms of settled meaning, or which indicate offenses well known to and defined by the common law. Reasonable certainty in view of the conditions is all that is required, and liberal effect is always to be given to the legislative intent when possible."

The act of March 2, 1893, known as the "safety appliance law" makes it unlawful for any common carrier engaged in interstate commerce to run any train in such traffic that has not a "sufficient number of cars in it, so equipped with power or train brakes, that the engineer of the locomotive drawing such train can control its speed without requiring the brakemen to use the common hand brake for that purpose." (Section 1.)

A number of convictions have been had under this act, and the point of indefiniteness has never been successfully raised, if raised at all. In *Johnson v. S. P. Co.* (117 Fed. R., 469) the court said, referring to this act: "The act of March 2, 1893, is a penal statute. \* \* \* Its terms are plain and free from doubt, and its meaning is clear."

Coming now to the construction of the Sherman law itself in this connection, it will be observed that there was a period from 1890,

when the law was passed, to 1897 (at which time the Supreme Court ruled the question of reasonableness or unreasonableness out of the matter entirely), during which time the consideration of the law in the more important cases practically inserted the word "reasonable," and yet during this entire period, which is the only period in which this particular question could have been raised, the question of indefiniteness as a penal statute was never raised, so far as is known.

The leading and conclusive case during this period was that of *United States v. Trans-Missouri Freight Association*, in the circuit court of appeals, 1893 (58 Fed. R., 58), decided by Judges Sanborn, Shiras, and Thayer. In this decision it was held that the act applied only to unreasonable restraint of trade. The court used the following language in discussing certain specified cases:

"The main purpose of contracts of these classes that are thus held illegal is to suppress, not merely to regulate, competition. \* \* \* It is evident that there is a wide difference between such contracts and those the purpose of which is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight and only that which is necessary to accomplish this purpose."

And again:

"These decisions rest upon broader ground, on the ground that the main purpose of the obnoxious contracts was to suppress competition, and that they thus tended to effect an unreasonable and unlawful restraint of trade."

And again:

"There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial. \* \* \* If further authority is wanted for the proposition that it is not the existence of the restriction, of competition but the reasonableness of that restriction, that is the test of the validity of the contracts that are claimed to be in restraint of trade, it will be found in"—a number of cases thereupon cited.

The court was of course fully aware that this was a criminal statute, and yet it construed it as containing exactly the phraseology that is now being criticised as being too indefinite.

It must be remembered that for the purposes of this argument this particular decision is final and conclusive. This is the decision of the highest court that has passed on the question of the use of the word "reasonable" in connection with the antitrust law. The Supreme Court eliminated the question entirely in 1897, so that it has not had occasion to pass thereon.

But the language of the Supreme Court itself in 1897 in the *Trans-Missouri* case is also significant, although it did eliminate this question. Four members of that court were of the opinion that the word "unreasonable" should be in the statute, with all the implication that that opinion carries as to the propriety of the use of that word, while the opinion of the majority of the court went so far as to use the following language in connection with this phrase: "These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it, and not this court."

In this connection it is also necessary to refer to the language of Mr. Justice Brewer in the *Northern Securities* case (193 U. S., 361),

where he said in regard to past decisions that "the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade," thereby giving his assent to the propriety of the use of such language in connection with the antitrust law.

In concluding the consideration of the use of this phrase, it is possibly well to suggest also that, like all other branches of the law, the law of combinations must keep pace with economic conditions and be developed to fit modern facts; that, while this phrase has already been construed for many years, it is fair to say that it involves one of the most important questions of public policy, and probably will have to be construed still further by the courts; that such necessity for further construction must be faced; that it is not to be avoided; and that the bill in question will of itself produce a necessary advance in that application of the law to modern conditions that modern conditions imperatively require.

**"CLASS LEGISLATION" DEFINED.**

This bill is not what is known as "class legislation." Accurately speaking, the legislation which is objected to under this rather crude term is legislation which is contrary to the spirit of the fourteenth amendment in failing to give to all citizens the equal protection of the laws. (It is, of course, to be remembered that the fourteenth amendment applies to the States and not to the Federal Government, but nevertheless the fundamental principle involved in that amendment is to a certain extent applicable to Federal legislation.)

Class legislation, or discrimination in legislation, is objectionable only when the discrimination is not based on substantial grounds of difference. The rule is that the line of classification must have a direct connection with the difference in privilege or duty pertaining to the different classes. Legislation by classes is the rule rather than the exception. Legislation differs when it is applied to railroads, to steamboats, to sail vessels, to industrial corporations, to banks, to insurance companies, to private citizens, and in innumerable other cases, each one of these classes being subject to certain special laws, and necessarily so. The sole question is whether the special legislation is justified by a corresponding special difference as to its objects.

In this bill corporations which give a certain high degree of information are allowed certain privileges. The connection between the two points is obvious and close, and forms a proper basis for a regulation of interstate commerce. The bill admits that reasonable combination is proper. This is based on public policy. But if such combination, carrying as it does the possibility of the concentration of great industrial power, is to be allowed, it is a necessary corollary that it must be supervised and regulated, and supervision must have, as its first essential, the means of securing sufficient information. This feature is also based, therefore, on public policy. The distinction between the rights of registered and nonregistered corporations is fully justified by the distinction as to the methods of regulation and supervision which is thus given by such registration and the information obtained thereby. In other words, if the Government is to recognize, as it probably must, the tendency toward combination, it is obliged to have added powers of supervision, through publicity, as to the methods of such combination.

Therefore the two features, privilege of reasonable combination and the duty of giving information, are not only relevant and properly connected and form a true basis for a legal classification, but are essentially inseparable and must be enacted into law at one and the same time and in the same bill.

"Legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment" (the fourteenth amendment). (*Barbier v. Connolly* (Laundry case), 113 U. S., 27; *U. Railway Company v. Beckwith*, 129 U. S., 26, and cases cited therein.—*R. R. Cattle Damage case*.)

"Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." (*Gulf, C. and St. F. Ry. v. Ellis*, 165 U. S., 155.)

"The inhibitions of that section (section 1 of the fourteenth amendment) are laid upon the action of the several States and have no reference to legislation by Congress." (Chinese summary trial, presumption of guilt.) (*In re Sing Lee*, 54 Fed. Rep., 337.)

"The equal protection of the law \* \* \* does not forbid classification. \* \* \* The power of classification has been upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished." (*Atchison Ry. v. Matthews*, 174 U. S., 103; see also *Ky. R. R. Tax cases*, 115 U. S., 321.)

#### SUGGESTED AMENDMENTS.

I would suggest certain amendments, largely matters of detail, as follows:

(1) Page 1, lines 8 and 9, strike out the words "affected by this act" and insert in lieu thereof "engaged in commerce among the States, or between a State and a Territory, or between a State and the District of Columbia, or with foreign nations."

(2) The section numbers of this act should be changed, section 8 being made section 9, etc., throughout the act, as apparently there was a clerical error in overlooking the fact that the present Sherman law has eight sections.

(3) Page 3, line 6, insert after the words "action of" and before the words "the Commissioner" the words "cancellation by." This is to make it clear that the appeal provided for applies only to the cancellation of registration, as was intended by the wording here.

(4) Page 5, line 1, strike out the words "declaring that in his" and insert in lieu thereof the word "disapproving." Line 2, strike out the word "judgment" and the words "is in unreasonable." Lines 3 and 4 strike out the words "restraint of trade or commerce among the several States or with foreign nations," so that the clause as thus amended will read: "may enter an order disapproving such contract or combination." This is in substance all that is intended by this section. The phraseology stricken out is not necessary and is somewhat misleading, inasmuch as it gives an appearance of a judicial finding greater in extent than is actually given by the section. The whole effect of the finding is expressed in lines 4 to 16, on page 5.

(5) Page 5, line 7, after the words "this act" and before the word "for" insert the words "against any corporation or association registered under this act or against any individual." This amendment is intended to cover the possible evasion of the provisions of the act. As the act now stands it is conceivable that corporations desiring to get the benefit of the act but not desiring to register might form a straw corporation which should register, include that corporation as a party to any contract which they desired to make, and then that corporation by presenting the contracts could get the benefit of the act, although the real parties in interest were unregistered corporations.

(6) Page 9, line 1, strike out the word "this" and insert in lieu thereof the word "the." Same line, after the word "immunity" and before the word "if" insert the words "provided in this section." This change is intended to make it clear that the limitation expressed in this clause applies to all the immunities referred to in section 4, and not merely to the one last mentioned.

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COMMITTEE ON THE JUDICIARY,  
HOUSE OF REPRESENTATIVES,  
*Friday, May 1, 1908.*

The subcommittee met at 2 o'clock p. m., Hon. Charles E. Littlefield (chairman) presiding.

**STATEMENT OF HON. CHARLES G. WASHBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS.**

Mr. WASHBURN. Mr. Chairman, I appear before this committee not for the purpose of advocating the passage of the Hepburn bill or of condemning it, but to say a few words on the general proposition and the way in which the Sherman antitrust act affects a large interest throughout the country that thus far, as far as I have followed the hearings, has received very little consideration, and I refer to the small corporations scattered all over the country, engaged of necessity in interstate commerce, whose legitimate business operations are interfered with to a greater or less extent by the construction put upon the Sherman antitrust act by the decision of the Supreme Court in 1897. For example, in the Commonwealth of Massachusetts there are over 5,000 business corporations of which nothing is known in detail, or needs to be known, by any public authority excepting the State authorities. The shares of very few of them are dealt in to a sufficiently great extent to have any market value put upon their stock. They are interested very largely in manufacturing, and, as an incident to the successful conduct of their business operations, find it desirable from time to time to enter into business arrangements with their competitors in the way of combination which, prior to the decision of 1897, they were able lawfully to do, and which by the construction placed upon the Sherman Act by the Supreme Court in 1897 makes the combinations, the pooling arrangements, the agreements as to the price which for years they have entered into freely, illegal. This evil or inconvenience—

Mr. LITTLEFIELD. Or embarrassment.

Mr. WASHBURN (continuing). Or embarrassment, as you suggest, is now pretty generally recognized, and petitions are coming from



these people to Congress for some alleviation of the existing conditions. I received one the other day from the Wholesale Grocers' Association of Boston in which they request that some legislation may be had which shall make it possible for them to enter into reasonable trade agreements.

Mr. LITTLEFIELD. What is the purpose of those agreements? Is it to regulate the price?

Mr. WASHBURN. The purpose of those agreements, and there are hundreds of them in all lines of business, is of course to control to some extent the price of the commodities in which the parties to the agreements are dealing. Those agreements are not entered into with any altruistic motives; they are entered into, of course, for the purpose of enabling the parties to maintain what they regard as reasonably satisfactory and remunerative prices.

Mr. LITTLEFIELD. Of course all those would directly affect the consumer.

Mr. WASHBURN. Certainly. Those agreements are of several sorts. There was the old-fashioned combination regulating the maintenance of prices which the parties to the agreement entered into, and which was only partially kept, of course, and, while better than no agreement at all, was not particularly effective. Then when the parties to those agreements sought to strengthen them, they entered into pooling arrangements among themselves, and those agreements, of course, were only partially successful; but they, too, were better than nothing in enabling the participants in them to protect themselves from what they regarded as ruinous competition. When the Sherman Act was passed in 1890, following as it did the passage of the antitrust laws in a large number of our States, it was aimed at combinations of that character, unquestionably. The debates in Congress would indicate it. Numerous quotations have already been made from the debates in Congress. Senator Hoar on that occasion said:

We have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions.

Senator Sherman said:

It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal governments. Similar contracts in any State in the Union are now by common or statute law null and void.

In other words, the intention, as I think is thoroughly well established, of those who framed that act was to create a statute declaratory of the common law making contracts in unreasonable restraint of trade null and void and at the same time making the statute a penal statute by the affixing of certain penalties, and that the courts in the early days so understood it is perfectly apparent from a study of the cases. For example, here in the 52 Federal Reporter at page 104 is the case entitled "In re Greene"——

Mr. LITTLEFIELD. Before you take up the cases, is it your idea that these arrangements have resulted in a larger price to the consumer than would otherwise have been the case, or have they had a negative effect so far as the consumer is concerned? What is your idea about that as a business proposition?

Mr. WASHBURN. Oh, I suppose the result of those agreements has been to secure a larger price from the consumer.

Mr. LITTLEFIELD. That is, on the whole, with the existence of such agreements the consumer has actually paid more than he otherwise would under other conditions?

Mr. WASHBURN. Than he otherwise would under absolutely unrestricted competition. In so far as these agreements have worked at all, they have prevented ruinous competition among those who have been parties to them.

Mr. LITTLEFIELD. They have operated really to protect, rather, the capital invested in the business?

Mr. WASHBURN. Yes.

Mr. LITTLEFIELD. That is, the maintenance of what would be perhaps an excessive increase in the price has operated to maintain the steadiness of the business, so that the price to the consumer has been raised above what it would otherwise have been?

Mr. WASHBURN. The same principle, of course, is involved in the pooling of railroad traffic. When these cases began to get before the courts, and up to 1897, in almost every case the courts found that these agreements were not inhibited by the Sherman antitrust act. There is just one case that I have found, and there may be others, that was held to be inhibited by the Sherman antitrust act, and that is the case of the United States *v.* The Jellico Mountain Coal and Coke Company reported in 46 Federal Reporter, page 432, in 1891, a case in equity on a bill of injunction, where an agreement between certain coal mining companies and their distributing agents was found to be in contravention of the Sherman antitrust act, and they were enjoined from further violation of the act. There may be other cases, but that is the only one that has come to my attention. On the contrary, most of the cases were of the sort to which I will now refer. I have referred to the case of *In re Greene*, in 52 Federal Reporter, at page 104. It is interesting to consider that case a little in detail, because it illustrates pretty clearly the nature of pretty much all of these combinations, and it illustrates the sort of combination that was not held to be in contravention of the Sherman Act before the decision in the *Trans-Missouri* case in 1897, and just the sort of combination that has been held to be in contravention of that act ever since that decision. The facts, in brief, were these: That the Distilling and Cattle Feeding Company, organized under the laws of Illinois, obtained control over 70 other distilleries, in one way and another, and controlled 75 per cent of the product of the United States, and thus could measurably control the prices at which they would sell. The court, when it came to decide the case, held that this was not such a monopoly as was contemplated by the Sherman Act, because of the fact that the restraint was partial, that a complete monopoly was not secured, and for that reason that it was not inimical to the Sherman Act, and among other things the court said:

Where the restraint is partial, either as to time or place, its validity is to be determined by its reasonableness and the existence of a consideration to support it. The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured. No precise boundary can be laid down as to when and under what circumstances the restraint would be reasonable and when it would be excessive.

Then there are a number of citations. Substantially the same sort of a case arose a little later, which is reported in the same volume, 52 Federal Reporter, page 646, the case of *United States v. Nelson*.

Mr. LITTLEFIELD. Was that Greene case a case of a contract, the construing of a contract, or was it a bill in equity?

Mr. WASHBURN. It arose on petition for a writ of habeas corpus to release Louis H. Greene from the custody of the United States marshal, by whom he was held awaiting his removal to the district of Massachusetts to answer an indictment for an alleged violation of the act of July 2, 1890, the Sherman antitrust act.

Mr. LITTLEFIELD. It was a criminal prosecution?

Mr. WASHBURN. Yes. The case of the United States v. Nelson is to be found at page 646. This was a case at law. There was an indictment under the act of July 2, 1890. This was on demurrer. The court held that an agreement between a number of lumber dealers to raise the price of lumber 50 cents per thousand feet, in advance of the market price, can not operate as a restraint upon trade within the meaning of the act of Congress "To protect trade and commerce against unlawful restraint and monopolies," and the court went on to say, and this expresses just as well as any language that I have found how the courts viewed this case:

An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, can not operate as a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least.

In other words, the act invoked against these old-fashioned trade combinations did not affect them adversely, and if the purpose of the act was to suppress combinations of that sort, it certainly failed of its purpose. But I now want to call the attention of the committee to another interesting fact, that while the act was not, in these and kindred cases, held to inhibit the trade combinations, whenever it was invoked against a labor combination, so far as I have observed the cases, it was sustained. I remember two or three weeks ago reading an article in the Outlook by Mr. Philip Post, of Chicago, in which he called the attention of the country to the Danbury Hatters' case, where, as he said, the doctrine was established that the labor organizations were under the ban of the Sherman antitrust act. Now, the labor organizations have been under the ban of the Sherman antitrust act for about fifteen years.

Mr. LITTLEFIELD. That is, there is no new doctrine laid down in the Loewe case?

Mr. WASHBURN. There is no new doctrine laid down, and I want to call the attention of the committee to this fact, that it would appear that in all those cases the courts held the view that all these labor organizations were in unreasonable restraint of trade. I am now referring to the decisions prior to the Supreme Court decision of 1897, and undertaking to differentiate between the way the courts viewed the labor combinations and the trade combinations. The labor combinations in those cases, among which was the Debs case, with which you are all familiar, found that those combinations were inhibited by the Sherman Act. On the other hand, they found that the trade combinations were not in contravention of the Sherman Act.

Mr. LITTLEFIELD. Were these cases you have just cited cases that were passed on by either district or circuit courts?

Mr. WASHBURN. Yes.

Mr. LITTLEFIELD. Did they afterwards go up to the Supreme Court?

Mr. WASHBURN. I do not know that any of them did go up to the Supreme Court, but here is the case of the *United States v. Workingmen's Amalgamated Council of New Orleans et al.*, in the circuit court for the eastern district of Louisiana, decided March 25, 1893. Among other things, the court says, at page 996:

The defendants urge that the right of the complainants depends upon an unsettled question of law. The theory of the defense is that this case does not fall within the purview of the statute; that the statute prohibited monopolies and combinations which, using words in a general sense, were of capitalists, and not of laborers. I think the Congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: "Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal." The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

I do not care to call attention in detail to all of the cases. There are several of them that are specially to be noted. Among others is the case of *Waterhouse v. Comer* (55 Fed. Rep., 149), decided in 1893 in the western district of Georgia, where the locomotive engineers were involved. Then again there is the Debs case, which attracted so much attention. That case did get up to the Supreme Court, but the Supreme Court sustained the proposition on much broader grounds than those contained in the Sherman antitrust act, as I recollect it, the Sherman antitrust act was not referred to in the decision, but the court held broadly that its jurisdiction extended to a case of that sort.

Mr. LITTLEFIELD. The Sherman antitrust act was referred to, and attention is called to the fact that the court below relied largely on the Sherman antitrust act, but in the Supreme Court they put it on much broader grounds, although in the Howard case the court go back to that case and call attention to the fact that in the Debs case they relied on both.

Mr. DAVENPORT. In the Loewe case they cited the case that Mr. Washburn cites of the Workingmen's Amalgamated Council.

Mr. EMERY. They practically treated it as a public nuisance.

Mr. WASHBURN. Up to the time of the decision in the *Trans-Missouri* case in 1897 the rule appears to have been that the validity of contracts restricting competition was to be determined by the reasonableness of the competition. If the main purpose, the natural and inevitable purpose, of a contract was to suppress competition or create a monopoly, it was illegal. If a contract imposed a restriction that was unreasonable or injurious to the public interest, or a restriction that was greater than the necessity of the party in whose favor it was imposed demanded, it was illegal; but contracts made for a

legal purpose which were not unreasonable or injurious to the public welfare, and which imposed no heavier restraint on trade than the interest of the favored party required, had been uniformly sustained notwithstanding their tendency somewhat to check competition. Of course we are all familiar with the decision of the court in the *Trans-Missouri* case, in 1897 reported in 17 Supreme Court Reports, page 540, the Supreme Court overruling the decision of the court below holding that every contract that restrained trade, whether such restraint was reasonable or unreasonable, was in contravention of the Sherman antitrust act, and my belief is and has been that that decision really hastened the formation of the modern consolidation as we know it, because when these trade combinations which I have referred to among manufacturers engaged in the same occupation were declared unlawful, they had to elect between dissolving those combinations or consolidating, and a great many of them consolidated, and of course the control over any given branch of business exercised by one of those consolidations was infinitely more complete than under the old-fashioned combination of any sort. While it would not be an exact statement, it would not be very far from the truth to say that we owe the modern trust, by which I mean the modern consolidation, to antitrust legislation.

You will find that immediately following that decision of the Supreme Court the lower courts of course were obliged to reverse practically the decisions they had been making up to that time. In other words, the same combinations, and trade combinations, which prior to the decision the lower courts had been finding legal and proper, subsequent to that decision they found to be illegal and improper. I do not know of any better illustration, and one is as good as five hundred, than the combination among the packing houses. There was a condition of things where the packing houses involved did not control all of the business. It would practically stand on all fours with the two cases I have mentioned, decided before the *Trans-Missouri* decision, and unquestionably that combination would have been held to be legal before the doctrine promulgated by the Supreme Court in 1897. But after that decision, the packers saw that their only safety lay in consolidation, and they proceeded to consolidate, and took themselves out of the purview of the act. I think the first case that arose after the *Trans-Missouri* case was the case of the *Addyston Pipe and Steel Company*, a very instructive case reported in 85 Federal Reporter, affirmed by the Supreme Court, 20 Supreme Court Reports, page 96, which found the trade agreement involved to be in contravention of the Sherman antitrust act. There are several cases which I will put into the record. That of *Swift and Co. v. United States* (106 U. S., 375), which found a combination of beef packers and dealers to be within the Sherman antitrust act; *Loder v. Jayne* (142 Fed. Rep., 1010), where a druggists' association controlling minimum retail prices of drugs was held to be in violation of the Sherman antitrust act; *Mines v. Scribner* (147 Fed. Rep., 926), where an association controlling 90 per cent of the publishing business, the members of which agreed not to sell to any publishers cutting established prices, was held to be in violation of the Sherman antitrust act; *Indiana Manufacturing Company v. The Case Machine Company* (148 Fed. Rep., 21), in which it was held that contracts tending to be in restraint of trade relating to patented

articles must be limited to the beneficial use of specific inventions only, in order to be protected by the patent act. It was held that a contract relating to harvesting machines not so limited was in violation of the Sherman Act.

Of course that imports another question, that of patents, which I do not care to dwell upon.

Mr. LITTLEFIELD. It is not material to this.

Mr. WASHBURN. No, sir. In the case of the Continental Wall Paper Company v. Lewis Voight & Sons (148 Fed. Rep., 939), a corporation organized to control 98 per cent of the wall paper mills in the United States, which fixed prices to jobbers and required exclusive dealings, was held to be in violation of the Sherman Act.

Mr. LITTLEFIELD. What is the date of that?

Mr. DAVENPORT. It is in 148 Federal Reporter. It must be quite recent.

Mr. WASHBURN. This case suggests to me a proposition that I would like to refer to, but not to discuss. I am not sure but what this case, where the purpose was to control 98 per cent of the output, might not have been held before the doctrine enunciated in the Trans-Missouri case to be a contract in unreasonable restraint of trade. That introduces the question which has been so much discussed as to a measure of what is reasonable and what is unreasonable. I have not examined the authorities carefully on this point. Mr. Davenport has; but they are all in the record, and I do not care particularly to pursue the matter, excepting to say that it has seemed to me that the common law doctrine which I have attempted to define earlier in what I have said would seem sufficiently exact to determine in each case, which must be determined more or less in relation to the conditions which prevail, whether a contract is or is not in unreasonable restraint of trade. I shall refer to this matter a little later in another connection, and I merely make the point now because of this particular case I have mentioned, the wall paper case, that would come pretty near being an absolute monopoly. Of course the court in that case might hold that while the monopoly seemed to be complete the field was a perfectly open one for other competitors to enter into, and that relief might thus be found, and might not hold that contract in unreasonable restraint of trade. On the other hand, the conditions might be such that they might—

Mr. LITTLEFIELD. Outside of these cases in the Federal Reports, have you found any common-law authorities that predicate the idea of "reasonable" or "unreasonable" upon any contracts in restraint of trade other than contracts where people contract themselves out of trade?

Mr. WASHBURN. No.

Mr. LITTLEFIELD. I have never been able to find any.

Mr. WASHBURN. Right on that point, while it is not going to contribute anything to the knowledge of those gentlemen who are in the room, it may not be amiss to refer to some cases in the Commonwealth of Massachusetts on precisely the point you mention. In the case of *Pierce v. Fuller* (8 Mass., 222), which was decided in 1811, which was upon a contract not to run an opposition stage on a certain road under penalty, it was said:

That the contract was a good one, being a limited restraint of trade where it appeared from the special circumstances that the contract was reasonable and useful.

Mr. LITTLEFIELD. That is exactly the kind of contract I refer to.

Mr. WASHBURN. Yes. Another case is that of *Perkins v. Dymon* (9 Mass., 522), which was decided in 1813. In that case a contract not to be directly interested in any voyage to the northwest cape of America, or in any traffic with the natives, for seven years was held to be good, the court saying:

That the trade could only be beneficial to a small number and that the community might receive benefit from such a contract, as it would prevent the trade from being overdone and so becoming profitable to none.

Those cases are precisely to the point you mention.

Mr. LITTLEFIELD. Yes; that is exactly what I had in my mind.

Mr. WASHBURN. Here is the case of *McConnell v. The Connors-McConnell Company* (152 Fed. Rep., 321), in which the contract relating to the sale of a banana-importing business, tending to increase the monopoly of the United Fruit Company, was held to be a violation of the Sherman Act and unenforceable.

We have also the case of the *Wheeler Stenzel Company v. The Window Glass Association* (152 Fed. Rep., 864), where an association of window-glass manufacturers controlling 70 per cent of the business in the United States for the purpose of fixing prices and territory was held to be a violation of the Sherman Act. There is another case which, before the decision in the *Trans-Missouri* case in 1897, would have undoubtedly been held to be perfectly lawful.

Mr. LITTLEFIELD. Can we go quite as far as that? Is it true with any of the cases you have called attention to as having been decided before 1897—is it true that they established any definite standard by virtue of which you could take a rule laid down in one case and apply it to a state of facts in another case?

Mr. WASHBURN. The reason I make that statement about this case—and of course the statement should not be made final and irrevocable until the case is examined—is because the figures caught my eye, that only 70 per cent of the business was controlled. In the *Greene* case above referred to they controlled 57 per cent of the business.

Mr. LITTLEFIELD. So that, reasoning from analogy, you see no reason why that should not reach the same result?

Mr. WASHBURN. Yes; this is merely to draw the contrast.

Mr. LITTLEFIELD. But is it not true that in all the cases decided before 1897 they undertook to establish a standard by which reasonableness and unreasonableness could be determined?

Mr. WASHBURN. It is true that the decision in each case held that the contract in that case was not in unreasonable restraint of trade.

Mr. LITTLEFIELD. But it did not undertake to lay down any definite rule by which that fact could be determined?

Mr. WASHBURN. I think not.

Mr. LITTLEFIELD. At any rate, it did not?

Mr. WASHBURN. No. Then we have another case, *John D. Park Company v. Hartman* (153 Fed. Rep., 24), a contract between the sole manufacturer of a medicine made under a secret process with jobbers as to prices, and so forth, which was held to be in violation of the Sherman Act and unenforceable. I merely at this point desire to establish the proposition that what is complained of most largely—I might almost go so far as to say exclusively—in the Sherman anti-trust act from every source excepting that of labor organizations is

the construction put upon the act by the Supreme Court in the Trans-Missouri case in 1897, and I want to add to that statement that it appears that the Sherman antitrust act, at least so far as the decisions in the inferior courts go, bore as hardly upon labor organizations before 1897 as it has since.

Mr. LITTLEFIELD. Yes. I suppose this suggestion, however, can be made, that the question of the price and the effect upon the consumer is certainly very remote in all the labor controversies, and in that sense, so far as its direct connection is concerned, it can largely be eliminated.

Mr. WASHBURN. Yes; I mention the labor organizations merely for the reason that the labor organizations have appeared here asking to be exempted from the operation of the act, and I call attention to the fact that an amendment of the act which would probably satisfy all the complaints made against it from every other source excepting that of the labor organizations would not meet the complaint that they make.

Mr. LITTLEFIELD. Yes; exactly so.

Mr. WASHBURN. And I make that statement without desiring to express my individual opinion upon that branch of the case, as to what ought to be done upon that line.

Mr. LITTLEFIELD. Certainly.

Mr. WASHBURN. I will say a word, too, upon the question of remedy.

Mr. LITTLEFIELD. Before you reach that I would make this suggestion. Appreciating fully the consequence of the legal proposition that you have indicated, would not the conditions existing before 1897, as contrasted with conditions since, from a legal standpoint—would not the whole question involving determination of the question of policy, as to whether it was going to be wise to adopt any amendment that would result in such a construction as was applied prior to 1897—depend altogether upon the view a person took of the question as to whether a condition ought to be allowed to be created that would increase the price?

Mr. WASHBURN. Unquestionably.

Mr. LITTLEFIELD. And then the question would come as to whether you could have an added appropriate amendment that would confine the price within a reasonable limit. Of course if you left it open so that people could enter into such agreements without some specific definite legal distinction the bars might be entirely thrown down and the price inordinately increased. Then would come equally the question as to whether it would be wise to allow conditions to exist by which people might enter into what they looked upon as reasonable trade agreements which would have such a direct effect upon the consumer in the raising of the price.

Mr. WASHBURN. What you say raises the question I was going to raise later on, that a distinction, in my opinion, should be made between different classes of corporations. The quasi-public corporations should be treated very differently from the private corporations. The private corporations should be treated somewhat differently, depending upon the class in which they may be put. For example, I said a few moments ago that there are 5,000 business corporations in the Commonwealth of Massachusetts. Many of them have not over three stockholders. They are partnership corporations. They are in



the corporate form because it is more convenient to do business in that way, but practically the business differs in no way from that conducted by an ordinary partnership. There are 5,000 of such concerns.

Mr. LITTLEFIELD. I suppose, strictly speaking, we have not any more legal right to control their business than we would have to control the business of partnerships.

Mr. WASHBURN. Well, I express no opinion as to our right, I think perhaps we would have a greater right; but I am now speaking particularly of the question of policy.

Mr. LITTLEFIELD. Yes.

Mr. WASHBURN. On the other hand, when you come to corporations like the United States Steel Company, whose stock is listed on the stock exchanges, whose stock is largely dealt in all over the country, and in whose operations very large numbers of people have an interest who are unable to inform themselves individually of the condition of the company, it seems to me that some further restrictions might be imposed. And what I say has a direct bearing upon this Hepburn amendment by reason of the fact that under the Hepburn amendment it is proposed that corporations engaged in interstate commerce, which of course means every corporation, shall file certain reports and do certain acts.

Mr. LITTLEFIELD. Disclose certain facts?

Mr. WASHBURN. Disclose certain facts. And without expressing an opinion as to the wisdom or unwisdom of that requirement, I want to point out that it would impose upon that Bureau an enormous amount of labor, whether or not those statements could be profitably examined and collated so as to disclose information which would be useful or not—

Mr. LITTLEFIELD. That is, to put the information in such shape that it could be with reasonable diligence utilized.

Mr. WASHBURN (continuing). Is a practical question into which I do not enter; but I will make this simple comment, that the brightest men sometimes find it difficult to analyze satisfactorily to themselves a business statement of a corporation in which they are themselves officers and whose sole business it is to inform themselves regarding the condition of that corporation.

Mr. LITTLEFIELD. And who do not have much of anything else to do.

Mr. WASHBURN. I have interpolated this suggestion because I think it has some practical bearing.

Mr. LITTLEFIELD. Of course those suggestions apply with very much greater force to the very large corporations than they would to the relatively small business organizations.

Mr. WASHBURN. Now, coming to the question of a remedy, I call attention merely in the interest of historical accuracy to the fact that these evils growing out of the construction of the Sherman antitrust act in 1897 have been recognized for some time and different remedies have been proposed. And right here the legislative branch of the Government is confronted with the necessity of establishing the public policy. If the best public policy is for absolutely unrestricted competition, the Sherman antitrust act as construed by the Supreme Court should be left absolutely untouched. If the correct public policy is for restriction of ruinous competition, then the difficulty presents itself of deciding how that change in the act is to be made.

In the Fifty-eighth Congress Senator Foraker introduced Senate bill 3937, which practically read into the act the word "unreasonable" in a negative way, and I will quote that act:

*Be it enacted, etc.,* That nothing in the act to regulate commerce approved February fourth, one thousand eight hundred and eighty-seven, or in the act to protect trade and commerce against unlawful restraints and monopolies, approved July second, one thousand eight hundred and ninety, or in any act amendatory of either of said acts, shall hereafter apply to foreign commerce, or shall prohibit any act or any contract in restraint of trade or commerce among the several States: *Provided*, That such restraint be reasonable or shall hereafter authorize imprisonment or forfeiture of property as punishment for any violation of such acts, except for perjury or contempt of court.

That bill, I think, was never reported, and Senator Foraker has now a bill, Senate 6331, introduced at this session of Congress, to legalize contracts and agreements not in unreasonable restraint of trade or commerce, differing from the earlier bill in that the later bill does not remove the penal features. It leaves them as they are.

Mr. LITTLEFIELD. That is, his first bill eliminated it as a criminal statute altogether.

Mr. WASHBURN. Yes.

Mr. LITTLEFIELD. And that is perhaps one of the reasons why the assertion that putting in the word "unreasonable" eliminates the act as a criminal statute does not impress him, because he is probably of the opinion that it ought not be criminal anyway.

Mr. WASHBURN. I put this in as a part of the history of the movement, and I do not care to comment upon this part of the proposition except to say that if the Foraker bill which I last read were to become a law it would put the Sherman antitrust act back where its framers thought they had put it, as nearly as we can judge from contemporary testimony, when it was enacted into law. Now, whether that would be satisfactory to those who want some restraining legislation or not, I am not prepared to say. I have heard the opinion expressed that if the Sherman antitrust act were amended as Senator Foraker proposes, it would practically permit all of the great combinations to maintain themselves unaffected by any lawful restraint. I do not express that as my own opinion, but as a fear that I have heard expressed by those who are interested.

Mr. LITTLEFIELD. That is, there is such an apprehension? We have not had any information before the committee as to what these large corporations desired to do, which they are not now authorized to do.

Mr. WASHBURN. I do not think, Mr. Chairman, that the large corporations already organized and doing business are particularly affected by this act, even as it is now construed, although they may be at any time if they desire to enter into combinations with other interests; but the interests that I am particularly speaking for to-day are the hundreds and thousands of small independent corporations whose operations are interfered with by the act as it is now construed, and I have sometimes thought that in discussing this question the attention of the public has been too much focused on the great labor interests and on the great aggregations of capital which are not trusts but which are simply large corporations and has been diverted from the fact that the hundreds and thousands of small corporations, which are after all the backbone of the business prosperity of the country, are adversely affected by this act as it is now construed. It has also appeared to me that people generally are too much impressed with

the alleged fact that almost all of the necessities of life are controlled by combinations or trusts or in some other way by which prices are unduly enhanced. The great cotton business, for example, the great woolen business, both of which are of great importance, are, so far as I know, unaffected, at least so far as the manufacturers of those fabrics are concerned, by any trust or combination, and beyond that the profits that are realized to-day—and I now understand that I am now going somewhat afield and I am willing to be stopped at any moment by the chairman—in our manufacturing operations are not commensurate in per cent with those that were realized thirty, forty, or fifty years ago by the small manufacturers who owned mills along our New England streams.

The people of the country do not realize what enormous sums of money are being put into the equipment of all our large manufacturing industries in order to save a fraction of a cent on a yard of cloth or in the production of a pound of steel. This is another side of the proposition. It is not involved at all in the discussion that is now going on excepting that it presents a side of the question that is, I think, too little dwelt upon by the people generally, and which might profitably be considered more carefully when we are summing up the great results as to whether the people of the country are held in the grasp of cruel monopolies, or whether on the whole they may not be getting at the present time more for a dollar in all the products of the land than ever before in the history of the country.

Mr. LITTLEFIELD. Why is not that question of the return to the manufacturer inevitably connected with the price to the consumer? You can not expect industrial success without at least a fair return on the capital invested. The consumer must necessarily expect to pay in the price a sum that will produce that return. I do not see why it is not very directly connected with that proposition.

Mr. WASHBURN. I merely did not want to go into it in my remarks.

Mr. LITTLEFIELD. No; I rather gather from your suggestion that the touchstone of contact with the public in relation to arrangements you have been referring to is reflected in the price to the consumer, and the matter that we might be required to concern ourselves about is whether or not we would practically protect the consumer by granting the authority suggested. Would not that be the proposition?

Mr. WASHBURN. Except with the suggestion that the producer is just as much entitled to protection as the consumer..

Mr. LITTLEFIELD. Whatever may be done in the line of legislation, there ought not to be any such legislation as deprives the producer of a fair return on his capital; and then in connection with that, so far as you undertake to affirmatively interfere with the economic conditions, I suppose that the legislature ought also to take care of the interests of the consumer and see that he is not charged an inordinate price. As to the practical proposition of relieving these conditions you have been describing, the question is as to where we should draw the line or establish a standard so that if the authority was given the consumer would be adequately protected, and an exorbitant price not charged.

Mr. WASHBURN. My reply to that would be that the freedom of contract should be interfered with by legislation in as small a degree as possible, and only to the degree that is necessary to protect—

Mr. LITTLEFIELD. Both parties?

Mr. WASHBURN. Yes; to protect both parties.

Mr. LITTLEFIELD. That is where we would all agree, on that. But does that enable us to legislatively establish the standard that we might both think to be desirable.

Mr. WASHBURN. I think not.

Mr. LITTLEFIELD. Is not that the unfortunate economic and legislative condition that we are in, and the difficulty we are up against?

Mr. WASHBURN. No; I do not think so, because I do not think it is necessary that the legislative body should undertake to describe with so great a nicety the relations that should exist between the producer and the consumer; and I will add that in my opinion it is impossible absolutely to provide a standard of the sort you suggest.

Mr. LITTLEFIELD. Then if we turned this whole matter over to the Commissioner of Corporations, we should have to take from him empirical decisions in each instance.

Mr. WASHBURN. I only care to make this statement in regard to that question, that under this Hepburn amendment the Commissioner of Corporations is going to be plagued as much to make the discrimination between a reasonable and an unreasonable restraint of trade as Mr. Davenport apprehends that the courts may be.

Mr. LITTLEFIELD. I think that may be quite true, but he can not reach his conclusion without taking into account the cost and a fair return on the capital, can he?

Mr. WASHBURN. I think not, and that would be a very difficult operation.

Mr. LITTLEFIELD. Without taking those elements into account; and would it not be practically unworkable for any one bureau to undertake to take the immense corporations, and the great number of corporations existing, and determine those facts and lay down rules which would establish the unreasonableness of particular contracts?

Mr. WASHBURN. I will express no opinion on that point.

Mr. LITTLEFIELD. Of course that is a matter that each man can infer for himself.

Mr. WASHBURN. But let me say again, and in closing—because I have taken a good deal of time already—

Mr. LITTLEFIELD. I do not understand that you take any position so far as the bill is concerned, one way or the other?

Mr. WASHBURN. No, sir. I have occupied more time already than I intended to.

Mr. LITTLEFIELD. You have very usefully occupied it, I am sure.

Mr. WASHBURN. I have not attempted to enter on the economic side of this question, as Professor Jenks has already covered that thoroughly, nor on the legal propositions in great detail, as Mr. Davenport and his legal associates have. I have desired merely to call attention to the points as I have made them in what I have said.

Mr. LITTLEFIELD. You have done it very clearly, and we are greatly obliged to you.

Mr. WASHBURN. You agree, Mr. Davenport, that the Trans-Missouri case, decided in 1897, is the great case on the construction of the Sherman antitrust act?

Mr. DAVENPORT. Of course the case of E. C. Knight & Co., was back of it.

Mr. WASHBURN. Yes, but that is on another proposition. That case in 1897 changed the law as it had been interpreted up to that time. That is what it did.

#### ARGUMENT OF MR. DANIEL DAVENPORT.

Mr. DAVENPORT. In the absence of any information which has been furnished this committee, or us who were opposed to this measure, in regard to these changes which have been introduced in the proposed bill in the last draft of it, I want to call the attention of the committee to the astounding results that follow. According to the revised scheme, when the contract of combination is submitted to the Commissioner of Corporations he, if he disposes of it, is to make an order, and from that order some sort of an appeal lies to the Interstate Commerce Commission, of which body he is to be for the time being, on the appeal, a member; and then from that decision of that body there seems to be intended that there should be an appeal to the courts, if I understand it, the party may have such an order as that made against him *ex parte* for after hearing, if desired, by the Commissioner. Then, of course, there is the hearing before the first appellate tribunal, and then a later hearing before the court. Now, if the order of the Commissioner stands unchanged, either without appeal or after appeal, from the time that order is made and published as is provided, subject to the liability of its being set aside in the interim, if the party presenting his contract or combination for approval does anything under that contract or combination, he is guilty of a misdemeanor and is punishable by a fine of \$5,000 or imprisonment for a year, I think, or both.

It seems to me that that provision runs squarely up against the sixth amendment of the Constitution and against the provision of the fourth article of the Constitution. The question to be determined is whether or not he has done something that is in violation of the provisions of sections 1; 2, and 3 of the existing Sherman Act. If it is the opinion of the Commissioner that he has violated either of those, and the order is made, then he becomes liable.

I want to call your attention to the constitutional provisions which I think are disregarded by any such course of procedure as that. In the third article of the Constitution, which controls the subject—

► Mr. LITTLEFIELD. It is not a violation of the order of the Commissioner. The proposition is that after the Commissioner makes an order, holding, for instance, that the contract is in unreasonable restraint of trade, if the party affected by the order does anything in the performance of the contract or in pursuance of the combination upon which the Commissioner has passed—not in violation of the order of the Commissioner, but after the Commissioner shall have found that it is in unreasonable restraint of trade if he undertakes to carry out that contract—he is liable to the penalties. It may be the same thing in your mind. Let us see about that. This reads:

If any party or parties to any such contract or combination of which a copy or written statement shall have been filed as aforesaid shall do any act in performance of such contract or in pursuance of such combination after the Commissioner of Corporations or the Interstate Commerce Commission shall have entered an order as aforesaid, such party or parties, unless such order of the Commissioner on the rehearing herein-

before provided shall have been replaced by a new order or such order shall have been suspended or set aside by order of the court as herein provided, shall be deemed guilty of a misdemeanor.

It is a misdemeanor because he does something in pursuance of that contract, or something in pursuance of the combination. It is not exactly doing a thing that the Commissioner has ordered him not to do.

Mr. DAVENPORT. He has made an order in terms——

Mr. LITTLEFIELD. Yes, holding that this contract is in unreasonable restraint of trade.

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. If he undertakes to carry out that contract——

Mr. DAVENPORT. He then becomes guilty of a misdemeanor. In other words, he has committed a crime.

Mr. LITTLEFIELD. That delegates to the Commissioner the power to say whether a certain thing shall or shall not become criminal, practically.

Mr. DAVENPORT. I was calling attention to the third article of the Constitution, which provides:

The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Not satisfied with the provisions in regard to this subject which was embraced in the original Constitution, in article 6 it is provided as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Now, if the first section of the act continues in force, and the party were prosecuted criminally for anything done under it, he would be entitled to all these privileges and these methods, an accusation of the crime of which he shall have been informed, a trial by jury, and so forth, under the limitations. As this is arranged, the party is stripped of all that protection. He would have a right to have the court lay down the law to the jury as to whether or not this was a thing in restraint of trade. He would have a right to the prescribed law on the subject. Right here I want to call the attention of the committee, as bearing on this subject, to what the Supreme Court of the United States has said on this subject, and I read from the case of *Colburn v. Thompson* (103 U. S.), first from page 191. After speaking about the division of the powers; he says:

In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the Government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments can not be exercised by another.

It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always

without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them.

From page 182 of the same book, the same case, I read as follows:

The powers of Congress itself, when acting through the concurrence of both branches, are dependent solely on the Constitution. Such as are not conferred by that instrument, either expressly or by fair implication from what is granted, are "reserved to the States respectively, or to the people." Of course neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments. No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that no "person shall be deprived of life, liberty, or property without due process of law," the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the Constitution. That instrument, however, is not wholly silent as to the authority of the separate branches of Congress to inflict punishment. It authorizes each House to punish its own Members. By the second clause of the fifth section of the first article, "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member," and by the clause immediately preceding, it "may be authorized to compel the attendance of absent Members, in such manner and under such penalties as each House may provide." These provisions are equally instructive in what they authorize and in what they do not authorize. There is no express power in that instrument conferred on either House of Congress to punish for contempts.]

The part I wanted particularly to direct your attention to is this:

It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment would be conceded by all thinking men to be unauthorized by anything in the Constitution.

Apply that principle to the remarkable situation which would arise from this provision. I must confess that it is very obscure, and when I attempt to penetrate its recesses it seems to me that the scheme here is to exempt from criminal prosecution under this law everybody except those where he has declared them to be in unreasonable restraint of trade; and that "suspicion," as I think they would call it, is confirmed—

Mr. LITTLEFIELD. Over suspicious?

Mr. DAVENPORT. Imbued with suspicion as we approach this measure. Those views are confirmed, or that theory, as you may say, is confirmed, by this which they propose:

And the United States may institute and maintain proceedings in equity under section four of this act to prevent and restrain the performance of such contract and the continuance of such combination and any action pursuant thereto in violation of this act.

Well, "this act" must mean the original Sherman antitrust act. I can not see any further into the millstone than those that peck it, but I urge upon the committee and upon the chairman of the com-

mittee to attentively and carefully examine and attentively consider the provisions in this section to see whether or not, if the courts ever were called upon to construe this remarkable production, they would not hold that the effect of this is to create in the Commissioner of Corporations in the one instance, and in the Interstate Commerce Commission in regard to interstate carriers, a body with the sole authority to determine whether or not any prosecutions whatever shall be instituted under this act. Of course, according to the scheme, if he does not condemn it, why, those peculiar provisions that were in the act before are all dropped out of here.

Mr. LITTLEFIELD. If he does not condemn it?

Mr. DAVENPORT. No, if he does not condemn it. Under these proposed amendments if he does not hold that they are in unreasonable restraint of trade that is equivalent to a holding that they are in reasonable restraint of trade, and if upon prosecution they appear to be in reasonable restraint of trade, then they are not liable; but if on prosecution they do not appear to be in reasonable restraint of trade, but are in unreasonable restraint of trade, then they are liable. That is what I understand these people to mean. Is not that the way you understand them to put it?

This is the scheme as I understand it, and as it is expressed in the original bill. The matter was passed up to the Commissioner of Corporations, and he looked at it, and if within a certain time he did not say that that was in unreasonable restraint of trade, thereafter no prosecution should be made against that party, carried on by the Government, unless it was in unreasonable restraint of trade.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. That is the scheme in the bill that has been before this committee up to the time when this new-fangled proposition was brought up.

Mr. LITTLEFIELD. That is what they started with.

Mr. DAVENPORT. Yes. If I am any judge of the force of language, here the position is entirely reversed, and when the Commissioner makes his order, then that is the end of the matter. Those that he does not consider ought to be prosecuted are not to be prosecuted, and those that he thinks should be, ipso facto the party is foreclosed of the subject, and it is decided to be a contract in unreasonable restraint of trade.

Mr. LITTLEFIELD. In other words, under the original bill it was simply a prima facie holding, and now your proposition is that it is a conclusive holding?

Mr. DAVENPORT. Certainly.

Mr. LITTLEFIELD. Let us see how you reach that conclusion.

Mr. DAVENPORT. In order to do that we have got to go back and see the remarkable changes that have been made to do that. The original bill as proposed related only to such arrangements as were in unreasonable restraint of trade, contracts or combinations. That is the only thing implied. Now see how this has been changed. It reads:

No prosecution, suit or proceeding by the United States shall be begun under the first six sections of this act for or on account of any such contract or combination hereafter made of which a copy or written statement shall have been filed as aforesaid, or for or on account of any acts done in performance thereof by or in behalf of such corporation,



association or person, unless such contract or combination shall be in unreasonable restraint of trade or commerce as defined in sections 1 and 3 of this act, or shall constitute a conspiracy in violation of section 1 or of section 3 of this act—

Conspiracy, you understand—

or shall be in violation of section 2 of this act.

Then it continues:

If in the opinion of the Commissioner of Corporations any such contract or combination of which a copy or a written statement shall have been filed—

Mr. LITTLEFIELD. I see they leave out "conspiracy" in that language.

Mr. DAVENPORT. Well, no; they do not say "conspiracy," but the language follows right on here. Now, what is Solomon going to pass on?

If in the opinion of the Commissioner of Corporations any such contract or combination of which a copy or a written statement shall have been filed as aforesaid shall be in unreasonable restraint of trade or commerce as defined in section 3 of this act, or shall constitute a conspiracy in violation of section 1 or of section 3 of this act, or shall be in violation of section 2 of this act—

Which is the monopoly section—

said Commissioner shall be authorized and empowered and it shall be his duty to enter an order to that effect, which order shall set forth briefly the grounds upon which it is based. Any such order may be made by the Commissioner upon his own motion and without notice or hearing within thirty days from the date of the filing of such contract or written statement. After the expiration of such thirty days no such order shall be made by the Commissioner except after notice to the party or parties—

You see, after thirty days he can make this order—

after notice to the party or parties who filed such contract or written statement and after giving such party or parties an opportunity to be heard and such order shall take effect upon a date therein to be specified not less than ten days after the filing thereof; but any person aggrieved by such action of the Commissioner of Corporations—

Now, look here—

or the United States in the case of his nonaction, may apply to the Interstate Commerce Commission for a rehearing of the case; and said Commission (with which the Commissioner of Corporations is hereby authorized to sit for the purpose of such rehearing with the powers and duties of a member) is hereby authorized and directed after due motion to rehear such case and thereupon to enter such order in the case as seems to it proper, subject as in other instances to appeal to the courts as hereinafter provided.

That must refer to the section providing for interstate commerce carriers.

Mr. LITTLEFIELD. No; that refers to a subsequent statement down there in the bill authorizing them to bring a bill in equity to set aside the decree.

Mr. DAVENPORT. No; I think there is a specific provision here in regard to those carriers.

Mr. LITTLEFIELD. You will find in that same section that power is granted to the court.

Mr. DAVENPORT. Well, to continue:

If any party or parties to any such contract or combination of which a copy or written statement shall have been filed as aforesaid shall do any act in performance of such contract or in pursuance of such combination after the Commissioner of Corporations or the Interstate Commerce Commission shall have entered an order as aforesaid, such party or parties, unless such order of the Commissioner on the rehearing hereinbefore provided shall have been replaced by a new order on such order shall have been suspended or set aside by order of the court as herein provided, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not

exceeding five thousand dollars or by imprisonment not exceeding one year, or both said punishments; and the United States may institute and maintain proceedings in equity under section four of this act to prevent and restrain the performance of such contract and the continuance of such combination and any action pursuant thereto in violation of this act.

It looks to me as though the purpose and probable effect of that language is to put the Commissioner of Corporations subject of course to the review provided—

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT (continuing). In the position of absolutely saying, instead of leaving it open to investigation by the courts, that all that he approves of are reasonable, and people are not to be prosecuted for them.

Mr. LITTLEFIELD. No; all that he does not enter any order in regard to are reasonable.

Mr. DAVENPORT. And they are not to be prosecuted for them.

Mr. LITTLEFIELD. You say all that he holds reasonable. It is rather all that he does not enter an order in regard to.

Mr. DAVENPORT. All that he does not condemn, in other words.

Mr. LITTLEFIELD. As to those no orders are entered.

Mr. DAVENPORT. No order is entered and nothing further is to be done. He can, however, after the thirty days—

Mr. LITTLEFIELD. Reopen it.

Mr. DAVENPORT. Give them notice and pass on the question at a later date.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. But in the absence of any such action by him, acquittance is given to any contract or combination that he does not disapprove, acquittance from all prosecution by the Government, either at its own instance or upon the application of people who feel that they have been injured by that combination which they think is in unreasonable restraint of trade.

Mr. LITTLEFIELD. And they leave out under this amendment the language they had in the other bill providing that they should not be held liable for such contracts as to which he has entered no order, unless they were in unreasonable restraint of trade?

Mr. DAVENPORT. It does not appear here.

Mr. LITTLEFIELD. It does not appear? That was the language that gave a prima facie effect to his decision and exempted the man who entered into a reasonable contract from prosecution provided the contract was held to be reasonable, in the case of a prosecution therefor. Now they have left the language out?

Mr. DAVENPORT. The old bill was not decisive at all on the proposition.

Mr. LITTLEFIELD. But the old bill had a proposition like that, that they would not be held liable unless the court found that the contract being inquired about was in unreasonable restraint of trade, and the proposition was that it was reasonable, and they would not be liable. Now, have they left out all those propositions?

Mr. DAVENPORT. It has changed the effect of it entirely, according to my understanding of it. The contracts that he does not disapprove of, and arrangements that he does not disapprove of, the Government can not prosecute for.

Mr. LITTLEFIELD. There is no provision for that in the amended bill, anywhere?

Mr. DAVENPORT. No; and on the contrary those he does not approve of and which stand in the event of an appeal are ipso facto adjudged to be in unreasonable restraint of trade, and the party, if he does any act to carry out such contracts, is subject to punishment criminally and also to be wound up by the Government.

Mr. LITTLEFIELD. Is that quite correct, under the language of that bill, quoad prosecutions under this Sherman antitrust act, independent of the amendment, or does the suggestion you now make apply to acts done in pursuance of the condemned contract after it is condemned by the Commissioner?

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. Does not your suggestion apply to that last condition?

Mr. DAVENPORT. Yes, it does, to the last one.

Mr. LITTLEFIELD. Yes, to the last, and not to the first; that is, those contracts which are said to be in unreasonable restraint of trade are not exempt from prosecution on general principles under the Sherman antitrust act?

Mr. DAVENPORT. None of them are.

Mr. LITTLEFIELD. No.

Mr. DAVENPORT. They are all, reasonable or unreasonable, subject to prosecution.

Mr. LITTLEFIELD. As it stands now; what if the Commissioner of Corporations holds that a certain contract submitted to him is in unreasonable restraint of trade; that leaves it where it would be subject to prosecution under the Sherman antitrust act as it stands to-day, irrespective of this proposed amendment; do you not so understand it?

Mr. EMERY. No.

Mr. LITTLEFIELD. Or do you hold that there should be no prosecution even at that except for acts done under that contract subsequent to the order made by the Commissioner?

Mr. DAVENPORT. I should suppose the latter. It can not be the purpose of these people that when the contract is produced to be ruled upon by the Commissioner, subject to all these appeals, the Government can turn right straight around, without awaiting any action in the matter, and bring a prosecution against the fellow who has furnished the evidence to convict himself. He will, of course, have in a sense voluntarily furnished the evidence to convict himself.

Mr. LITTLEFIELD. Every prosecution is, then, predicated upon the order of the Commissioner?

Mr. DAVENPORT. Certainly—that is, as to those contracts which are submitted to him for action; that when the Commissioner has examined that subject and has made up his mind about it, if he enters the order, from that time forth anything done under that contract the man is subject to punishment for. At the same time there is nothing to require him, according to any rule to determine it. Two men might come up to him on the same day with identically the same contract, and he might say, either ex parte or after hearing, "In my opinion the contract of A is in unreasonable restraint of trade, and I do not think the contract of B is in unreasonable restraint of trade." The one man, by the ipse dixit of the Commissioner, would be thereafter subject to prosecution and imprisonment and the other would be exempt from it. There is no law laid down, no law to determine

the action of that Commissioner. It is his opinion, his arbitrary, uncontrolled decision, which must rule.

Mr. LITTLEFIELD. There is no rule laid down; there is no rule or standard or anything.

Mr. DAVENPORT. There is nothing but his opinion. It rests in the breast of the Commissioner or in the breast of the Interstate Commerce Commission on appeal, or in the breast of the court at a later date, provided that this kind of a scheme is such that an appeal could properly be taken from them to the court.

Mr. EMERY. Is it not true also there not only in respect to contracts made by different persons under different conditions of action under this act, but is it not also true of the identical contract made by the same person with two different persons, that if one is registered and passed upon by the Commissioner and the other, identical with it in all respects, is not, the latter is still prosecutable under the first six sections of the act?

Mr. DAVENPORT. It is; but the arbitrariness of the thing is what I am calling attention to now. It would be perfectly within the power of the Commissioner to say that two contracts of identically the same character which two persons had, the one was good and relieved from this punishment and penalty, and the other bad. I want to know whether there is anywhere in our American system of government the possibility of the passage of any such law, and have it stand the test of constitutional principles?

Mr. LITTLEFIELD. Your proposition is that it puts in the hands of the Commissioner the power to say arbitrarily what state of facts shall and what state of facts shall not constitute a criminal offense.

Mr. DAVENPORT. That is it.

Mr. LITTLEFIELD. I do not see but that it is open to that criticism.

Mr. DAVENPORT. Quoting from this same case which I read before, in 103 U. S.:

No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that no "person shall be deprived of life, liberty, or property without due process of law," the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established.

After all the discussions that have been had in the committee as to whether this act would not be totally destroyed by the insertion of the word "unreasonable" before the words "in restraint of trade," I want to reiterate as pointedly as I can the contention that it would destroy it, and to impress upon the committee the fact that you could eliminate every single one of the objectionable features of this bill which are introduced in it as a positive correction or change in provisions of the existing Sherman antitrust act, like those that relate to the seventh section and which exempt labor unions; you could strike all those out and yet you would destroy this act for all purposes of enforcement by those interests that I more particularly represent here.

Mr. LITTLEFIELD. Let me assume the appositeness of the authorities you cite, and that the introduction of the word "unreasonable" or "reasonable," as it may be, makes the definition of the crime so uncertain that it is invalid as a criminal statute; there is no question but

all those consequences follow, or even that all the other results would follow, from a statute from which flow those two remedies, some criminal and some civil in character.

Mr. DAVENPORT. When you speak of a civil action, there are two kinds of consequences attending this matter from the illegality of them, as described in the acts. One is, the very property is confiscated.

Mr. LITTLEFIELD. Yes, that forfeiture which may legitimately follow from a quasi civil proceeding.

Mr. DAVENPORT. It would have to be some proceeding instituted in rem, I suppose, but that is just as bad—

Mr. LITTLEFIELD. Your action for damages is penal in its character.

Mr. DAVENPORT. Yes. Mr. Washburn called attention to the Addystone pipe case. The court in determining whether the statute of limitations would run against it—there were two State statutes, one of which ran against penal actions and the other against ordinary actions and the penal one was the shorter—and the court held that it was not penal in that sense; that is, that the statute did not run against it.

Mr. LITTLEFIELD. That is, did not run against it as a penal action within the meaning of the local statutes of that State. Of course that involved the construction of the language of that particular statute.

Mr. DAVENPORT. But the fact is that these civil consequences that you talk about, not followed by indictment and prosecution before a jury to verdict and judgment and imprisonment in the penitentiary, or stripping him of his property by a fine, that is not the only penal feature of this law in the light of the decisions I have quoted on the question of the invalidity of it. Anything that takes away from a man his property by condemnation or as a penalty for anything that he may have done, anything in the way of a forfeiture, the same principles would apply, and you might say that the question might be left still whether you could not bring your action in equity.

Mr. LITTLEFIELD. Are there any sound principles of legal construction that would justify a different construction of the word "unreasonable" in the same statute, when the same language applied, or from which flowed both civil and criminal remedies? That is, if it rendered the act vicious on its criminal side, why did it not render it equally vicious on its civil side; or by what principle of construction can we give any more liberal construction to the same language from which different consequences may flow?

Mr. DAVENPORT. If you will recall, it was in the Northern Securities case or some of those cases where there was a divided court, I think it was Mr. Justice Harlan who said that a liberal construction was to be given, or that not an unduly narrow construction was to be given, to this act, because of these penal features, because it was also a remedial act. You will remember that Mr. Justice Holmes in his dissenting opinion said that the same construction should be given to it in one case as in the other.

Mr. LITTLEFIELD. That is, he held it was criminal all the way through.

Mr. DAVENPORT. Yes, and Mr. Justice Harlan having pointed out that, said there never was any such doctrine in the law, that an undue narrowness should be given to the construction of a penal statute;

and he has a line of authorities on that subject. He quotes them in his opinion, as I recall it now.

Mr. LITTLEFIELD. The familiar principle is, of course, that criminal statutes in derogation of the common law must receive a strict construction.

Mr. DAVENPORT. In a certain sense.

Mr. LITTLEFIELD. In a certain sense. Legislation that is remedial in its character may have the other tendency.

Mr. DAVENPORT. But the point here is whether or not you have got to have in the law a prescribed rule of a definite character before you can proceed against the party either civilly or criminally. I take it that common sense teaches one that so far as the criminal proceedings are concerned, to put the word "unreasonable" in there without any standard to judge by would make it so vague that no man himself could say whether he was violating the law, nor could any judge lay down the principle if he had violated the law. It would rest finally and ultimately in the conscience of each juror on the question. And it is precisely those faults in the law which destroy it as a criminal statute. Professor Jenks yesterday thought that there was such a common law meaning attached to the word "unreasonable" that if you inserted it into the act there would be a sufficiently definite standard.

Mr. LITTLEFIELD. His proposition really was, first, that it was not definite, but it was as definite as the subject-matter would permit of.

Mr. DAVENPORT. Yes.

Mr. LITTLEFIELD. And that it was impossible to establish any more definite standard, and therefore he thought the court would sustain it. That is what I understood him to say.

Mr. DAVENPORT. Yes. He admitted the indefiniteness of it, and said that it was the only word by which the thing could be described.

Mr. LITTLEFIELD. Yes. It was impossible to make it more definite.

Mr. DAVENPORT. Yes, and that is the reason why it should be inserted in the act, in order to deal with the situation. That is the way I understood him.

Mr. LITTLEFIELD. Yes.

Mr. DAVENPORT. Of course he concedes the utter vagueness of the matter; but his contention is unhappily overthrown by the decisions of the courts in the very cases I have cited, because there is not anything in the history of the law that is better established than that at common law a party who paid an unreasonable rate for transportation could sue to recover it back, and that the party who sought to recover it from the shipper could not recover anything but a reasonable rate. There is a thing that for hundreds of years has had a definite meaning or a definite interpretation at the common law. And it was in precisely those cases where all the elements of vagueness that exist in regard to the other features of this matter were eliminated, that Mr. Justice Brewer said that such an act was void for uncertainty; and I would call your attention to what Mr. Justice Brewer said in the case of *Chicago and Northwestern Railroad Company v. Dey*, 35 Federal Reporter, page 181, of these hearings:

The next proposition of complaint is that the law is a penal one; that it imposes enormous penalties without clearly defining the offenses. It will be observed that section 2 requires that all charges shall be reasonable and just.

Now, that is what the common law requires, does it not? Of course it is. Not only does the statute require it, but at common law it was required that it should be reasonable and just. He continues:

Section 23 provides that if any railroad company shall charge more than a fair and reasonable rate of toll, or make any unjust charge prohibited in section 2, it shall be deemed guilty of extortion, and, by section 26, be subject to criminal prosecution, with a large penalty.

Then he says:

If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it

Mr. Chairman, what becomes of the distinction which Professor Jenks undertook to make between the case in Indiana where the law was held invalid, where the penalty was different for drawing a load on a narrow-tired wagon from that for one on a broad-tired wagon? He said that that was in itself impossible of definite comparison. But that is entirely different. He says that when you come to this question of reasonable and unreasonable you have got the whole history of the common law back of you. Now I say, What becomes of that distinction he undertakes to draw between the two cases? You will observe that the professor did not assume to comment upon these other cases. Again, to show that there is no uncertainty about this proposition, in the interstate-commerce act the provision was, where the party was indicted on violation of the interstate-commerce act prohibiting undue preferences, the court said:

But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty.

Now look at it; what sense is there in anyone hoping that a law passed here would not go necessarily into the wastebasket.

The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of *Chicago and Northwestern Railway Company v. Dey et al.* (52 Fed. Rep.) I had occasion to discuss this matter, and I quote therefrom as follows:

So that I take it the Congress of the United States will not undertake to alter this law by inserting the word "unreasonable" in it, unless it wants to destroy the criminal features of the act and the penal features of the act. If they desire to do that, this is a means open. But I take it that the people of this country have a very different view of the Sherman antitrust act from that advanced here by the gentlemen who seek to change it. For my own part, I look upon it as the very Magna Charta of commercial freedom in this country. I regard this act as necessary for the future welfare of the people of this country as the constitutional provision which was inserted there for the purpose of preventing interference with interstate trade by the States.

Mr. LITTLEFIELD. Do you remember what the result was in the case in the 25th Federal Reporter, the case of the Chicago and Northwestern Railway Company *v. Dey et al.*?

Mr. DAVENPORT. I do not know that I can state it.

Mr. LITTLEFIELD. Some of the language rather indicates to my mind that that was not passed upon in that case.

Mr. DAVENPORT. Which was not, the proposition?

Mr. LITTLEFIELD. The statute, in this case in the 35th Federal Reporter. He says:

If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to the complainant's criticism.

Mr. DAVENPORT. Minds operate very differently in regard to these matters. When a court lays down the proposition that the law has only got the word "reasonable" in it, and has got nothing in it to constitute a standard, that law will be bad, and on the other hand that there is something in the act that helps it out, that does not at all affect the applicability and the force of the authority.

Mr. LITTLEFIELD. Sometimes it has a good deal to do with the question as to whether it is an obiter dictum or not, so far as that is concerned, and it has a good deal to do with the authority, in my mind, to have the knowledge of the results of the case and the statement of the matter be determined, and then I can weigh the force of the matter a good deal better. I will look this up myself.

Mr. DAVENPORT. In regard to the case in 57 Federal Reporter, there the judgment was reversed because the statute was held to be void.

Mr. LITTLEFIELD. I think that clearly appears from the opinion itself, because the part which you quoted states "that there is nothing in the case to justify a verdict of guilty against the defendant."

Mr. DAVENPORT. The second part of the proposition is squarely met in the case from Kentucky, which case is cited with approval in the Supreme Court of the United States.

Mr. STEBBINS. It is very evident that the Senate, when they considered the bill, had all this in mind. You will remember the speech of Senator Hoar in 1893 when he introduced a bill granting additional relief, in which he called attention to the intended scope of the act, and then referred to the insertion of certain words. I do not remember what the wording is now, but I think "unjustly" or "wrongfully," and he said they purposely left those out. I can not remember exactly, but it is evident that they had it in mind.

Mr. LITTLEFIELD. But Senator Hoar's statement in 1900 and what he had in mind in 1890 is a pretty far cry, and it is pretty hard to tell.

Mr. STEBBINS. That may be.

Mr. EMERY. Was it the attempt to insert "unjustly" or "unreasonable" in the second amendment—

Mr. LITTLEFIELD. Yes, but they did not discuss it from this point of view. You have no new authorities, then, have you?

Mr. DAVENPORT. No. I will say that they are of a negative character. I have searched high and low.

Mr. LITTLEFIELD. Mr. Smith helped you out some.

Mr. DAVENPORT. The result in the case of Czarra—

Mr. LITTLEFIELD. I say it helped you out some.

Mr. DAVENPORT. That is a case right in point, illustrating the general proposition. He had another case that I do not recall; I did not quite catch the authority. It was something about the safety-appliance law.

Mr. LITTLEFIELD. That is in the Federal Reporter.

Mr. DAVENPORT. I did not catch it; but I noticed when it was read that the matter which was to be determined was one that could be scientifically determined, practically. But, as I say, with such



investigation as I have made, I have failed to find a single case that supports the opposite proposition. I am in the same position in regard to that as the judge is in one of these cases where he said he could not find any authority, and neither could counsel, but that both by authority and reason he was compelled to that conclusion, that a law of that character was void; and I want to say further that I have loudly called upon the gentlemen who promised to furnish these cases which they thought might exist, and I have not been able to get any.

Mr. EMERY. Would it interrupt you if I called your attention to a particular case there? For instance, suppose two common carriers in contemplation of the passage of this bill, before its passage, entered into an agreement to be effective one year after its passage. How can they be prosecuted when they undertake to execute that agreement?

Mr. DAVENPORT. I have not investigated that subject.

Mr. EMERY. I refer to that condition because just exactly that condition seems to be amply provided for by language which indicates that no prosecution could lie, no matter what the character of the restraint of trade.

Mr. DAVENPORT. I will call the attention of the committee to the fact that if this law was passed it would raise the dickens in regard to the continuing boycotts, and the damages they could recover.

#### STATEMENT OF MR. JAMES A. EMERY.

Mr. EMERY. I want to call attention for a moment to the possibilities of the contract to which I have just alluded. In the first place, under the original bill no provision whatever was made for the registration of common carriers. They were permitted to submit a contract to the Commissioner of Corporations, and he could pass upon the reasonableness or unreasonableness of the contract submitted, but no provision whatever was made for their registration. With respect to voluntary organizations and to corporations not covered by the Hepburn bill, a special provision for registration was made, and the definition of registration is there laid down; but with reference to carriers, all included under the act of 1887, no provision is made for registration, and they consequently obtained the immunities laid down under section 4, the final section, with respect to a period of limitation running against them, and that they could not be prosecuted for any combination in restraint of trade made prior to the passage of the act except it be in unreasonable restraint of trade. They got these immunities—the common carriers alone got them—without the registration required of industrial corporations. I said if under this act two common carriers before its passage entered into a contract in restraint of trade, to be effective one year after the passage of the act, I see no way under this act by which they could be prosecuted when they attempted to execute this contract. Section 5 reads:

That no suit or prosecution by the United States under the first six sections of the said act approved July second, eighteen hundred and ninety, shall hereafter be begun for or on account of any contract or combination made prior to the passage of this act, or any action thereunder, unless the same be in unreasonable restraint of trade.

Now, if it be held that this contract was made prior to the passage of the act one year, when they attempt to put it into operation the statute of limitations has run against them and they can not prosecute under it?

Mr. LITTLEFIELD. I see your point.

Mr. EMERY. And it is of no use to cancel their registration, because the act provides that these immunities apply to an organization unless—the language is here—“or if the registration of such corporation or association shall have been canceled before the expiration of one year after such registration.”

Consequently under this act it would be possible for traffic associations of all forms to be organized in contemplation of its passage, to be operative one year after its passage, and there would be no possible way under this act to prosecute them for the restraints of trade which they would have committed.

Mr. LITTLEFIELD. Or under the Sherman antitrust act.

Mr. EMERY. This of course would amend the Sherman antitrust act, and it would be the immunities here conferred that would make this prosecution impossible. Consequently voluntary associations secure privileges under this act of a more valuable nature than I had at first thought.

Mr. DAVENPORT. Is it not true that we could not prosecute criminally a boycotting combination unless we had a permit from the Commissioner of Corporations?

Mr. LITTLEFIELD. That is, provided they had become registered and submitted their contracts.

Mr. DAVENPORT. No.

Mr. EMERY. I want to call your attention to the provision for obtaining the benefit of this bill without the submission of the contract, merely by registration. The bill provides two steps. Associations may register in the first place and submit their contract in the second place, but voluntary associations acquire certain immunities by mere registration that other organizations do not acquire, either for their contracts or for the acts of their combination, unless they have them specifically passed upon by the Commissioner of Corporations. Under section 5, which is the section providing a statute of limitations for offenses in restraint of trade, it is provided:

That no suit or prosecution by the United States under the first six sections of the said act approved July second, eighteen hundred and ninety, shall hereafter be begun for or on account of any contract or combination made prior to the passage of this act, or any action thereunder.

Now, all the combinations of labor get the benefit of this section by mere registration—that is, by submitting their by-laws, names of their principal officers, and their place of business—and one year after this bill becomes a law they can not be prosecuted for any action or any combination formed existing prior to the passage of the act. Would not that have the effect of withdrawing from the operation of this law such combinations existing or their acts in restraint of trade prior to the passage of the act?

Mr. LITTLEFIELD. That might be.

Mr. EMERY. I say that is one advantage that the voluntary associations get. They get two other advantages. They get the advantage of the double ambiguity, the double impossibility, of interpreting the

language of the third section as recently amended. If the law as laid down by Judge Davenport with respect to the interpolation of the word "unreasonable" in here is sound, and it has been unanswered up to this time, then gentlemen who favor this legislation obtain all the advantages that the incorporation of such language would give. On the one hand they ask that they shall be prosecuted only for "unreasonable" restraints of trade. The advantage is doubly theirs, for the importation of such language into the act destroys the possibility of enforcing it. So they are assured of immunity not merely by operation of law, which they contemplate if the bill become a sound statute, but if the act is destroyed by making it unenforceable in a court of law through obscurities and illegalities incorporated into it, their immunity is doubly secure. So they are assured against prosecution for acts done in restraint of trade under either horn of the dilemma, whether the act be sustained on the one hand or destroyed on the other hand.

Mr. LITTLEFIELD. You can not very well predicate a proposition on the protection they receive if the act is destroyed, because it is then out of existence.

Mr. EMERY. That is exactly what the persons liable under it desire.

Mr. DAVENPORT. The Sherman antitrust act is destroyed.

Mr. LITTLEFIELD. You are speaking of the Sherman antitrust act?

Mr. EMERY. The effect of this amendment on the Sherman antitrust act.

Mr. LITTLEFIELD. Not in respect to this bill itself?

Mr. EMERY. Oh, if the object be to secure immunity—

Mr. LITTLEFIELD. You contend that the inserting of the word "unreasonable" wipes it out completely. That, of course, is common to all if it renders it invalid as a criminal statute.

Mr. EMERY. Of course it is common to all men who were liable to prosecution under it.

Mr. LITTLEFIELD. Certainly.

Mr. DAVENPORT. There is only one way to test the law, and that is to apply it to a specific, concrete instance, because that is what must be done when it is enforced. Take the American Federation of Labor, which is organized under its constitution for the purpose of carrying on a State boycott. They walk up and are entitled to register under that law. A year goes by, and the statute of limitations has run against it.

Mr. LITTLEFIELD. That is, as to all acts heretofore committed.

Mr. DAVENPORT. No; a year after they get immunity for the future as well as the past.

Mr. LITTLEFIELD. Do you go so far as to contend that if the American Federation of Labor is organized for the purpose of prosecuting interstate boycotts, it would be liable criminally for prosecuting an interstate boycott without making a new agreement or entering into some new agreement to act upon?

Mr. DAVENPORT. Certainly.

Mr. LITTLEFIELD. Your point is that the organization is criminal in its character?

Mr. DAVENPORT. Yes; to-day.

Mr. LITTLEFIELD. That may be true, but as to subsequent boycotts they would not be liable.

Mr. EMERY. That is exactly the point I was commenting on here, that they secure immunity for those acts which flow from the nature of the combination legalized and are thereafter committed.

The language is:

That no suit or prosecution by the United States under the first six sections of the said act approved July second, eighteen hundred and ninety, shall hereafter be begun for or on account of any contract or combination made prior to the passage of this act, or any action thereunder, unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations.

Mr. LITTLEFIELD. Your proposition is this, that the American Federation of Labor is per se an illegal organization, and it has already made contracts and combinations for the purpose of carrying on boycotts under this law to-day, and that at the end of a year, after that time the American Federation of Labor may decide to boycott Mr. Jones under the provisions of this statute for the reason that they were originally organized for the purpose of carrying on general boycotts; but they do not, until after the expiration of the year, develop an intention to boycott this particular man. Now, is it your idea that that language would render them immune from prosecution for an act done after the expiration of a year?

Mr. EMERY. If it was to carry out a purpose of the combination.

Mr. LITTLEFIELD. Could it properly be said that they had any combination or any purpose to boycott Jones when the purpose did not exist until a year after the law took effect.

Mr. EMERY. It did not exist with reference to the particular individual, but the general purpose to boycott any person who refused to accept the industrial conditions required did exist, and it has been asserted, and in fact it has been pleaded, that the combination is formed for that purpose. Now, after one year passes by, I think that is what follows from this language, so far as this language can give it effect.

Mr. LITTLEFIELD. I can not quite follow you there.

Mr. DAVENPORT. I most respectfully suggest that the very purpose of that is to put the United States Steel Company, we will say, or any of those combinations, on an unassailable foundation. It is quite a different proposition from the one you have been discussing.

Mr. LITTLEFIELD. That is a pretty stout proposition.

Mr. EMERY. I know it is, but you will observe that the purpose of this act is to confer certain benefits and immunities. This is certainly a great benefit. This exemption from prosecution is a great immunity and it is not granted to organizations for profit except they register and comply with the demands for information. But, so far as these voluntary organizations are concerned, they are to obtain these advantages by far less rigorous submission. It says:

That no suit or prosecution by the United States under the first six sections of the said act approved July second, eighteen hundred and ninety, shall hereafter be begun for or on account of any contract or combination made prior to the passage of this act or any action thereunder.

What is the purpose of that? The purpose of it is to establish a shorter statute of limitations. A statute of limitations against what? Why, to run against any offense committed or any unlawful thing of the nature of a combination against which the law could apply. Otherwise what is the purpose of shortening the statute of limitations?

It has no meaning unless it be to prevent the prosecution of some one. Now, the combination which is organized for the purpose of carrying out any boycott is in its nature a criminal combination. Whether it exists for the purpose of boycotting one man specifically or any men generally, what is the difference between it and a combination the purpose of which is to monopolize trade generally? The monopoly is illegal because of its purpose, but it would surely be exempt from prosecution under this bill at the end of the period here prescribed, one year after its passage. If that be true of a monopoly, how can it be less true of the boycotting combinations, no less criminal and no less illegal than the other?

Mr. DAVENPORT. The only criminal thing about the business is the contract. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal. The act says:

Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor.

And they shall be liable to prosecution.

Mr. LITTLEFIELD. Yes; but that clearly refers to the specific restraint of trade.

Mr. EMERY. I can not distinguish between an action following from a contract entered into and an action following from a combination. As to combinations entered into afterwards, that is quite a different matter; but as to the acts following from a combination made prior to the passage of the act and to which the statute of limitations applies, if the statute of limitations means anything it is to render them immune from the consequences of acts done as a result of the legalized combination. Then the voluntary associations consequently get the benefit of the double ambiguity and the double vagueness of expression. So far as any prosecution would be had against them under section 4, which is the section that endeavors to define and express the rights of combinations of employers or employees, any combination they formed would have to be in unreasonable restraint of trade, and that unreasonable restraint of trade would also have to be for a purpose not unlawful at common law. Now, we went into the subject of what would be unlawful at common law yesterday, assuming as a standard the English common law, and we suggested the standard created a new ambiguity, and Judge Davenport has suggested a primary ambiguity in applying the word "unreasonable" as to such combinations; so that you are now confronted with the proposition that against the voluntary association violating this act you would have to prove a contract in "unreasonable" restraint of trade and "unlawful at common law," which is an exceedingly dubious, vague, and shadowy suggestion.

I just wanted to take a few moments to call the attention of the committee to that, and I also wanted to call the attention of the chairman to a certain point that has been frequently referred to and constantly suggested and implied in the course of this discussion, and that is that not only the amendments excepting organizations of labor from this Sherman Act should be made for the reason that their contracts were of a different nature, but for the further reason that it was sought to recognize and vindicate in this act the rights of combination asserted by organized labor; Mr. Gompers dwelt on that at length. Mr. Low did say, both before your committee and

before the Senate committee, that it would be wise, and it was necessary to protect these rights in this statute, as though the proper place for the protection and securing of those rights was a Federal statute. I call your attention to a decision for the double purpose of further confirming the statements I made the other day with respect to the fairness and reasonableness with which Federal courts in the course of their decisions have treated the rights of men to combine for the protection for their labor and such other rights thereunder as were necessary for their protection, provided they did not violate the equal rights of other members of the community, and secondly for the purpose of calling your attention to the fact that the courts have decided that while the Constitution of the United States recognizes and declares the rights of men acting in combination, the protection and security of the rights of men to act in combination does not depend upon Federal courts or upon Federal statutes, but is exclusively to be protected by the enactments of the respective States. The case to which I shall call your attention in that regard is that of the *United States v. Moore et al* (129 Fed. Rep., 630). This was a case where a number of individuals were indicted on two counts, charging certain defendants with a conspiracy to injure, oppress, and intimidate one B. J. Grier, a citizen of the United States, to prevent the free exercise and enjoyment by him of a right or privilege secured to him by the Constitution and laws of the United States, to wit, "the right and privilege of establishing, organizing, and perfecting a local union of the United Mine Workers of America at Empire, in the county of Walker and State of Alabama."

The second count charges a conspiracy among the defendants to injure, oppress, and threaten said Grier.

The defendant demurred to the indictment on the ground that it appeared from the indictment that the right or privilege claimed was not secured to said Grier as a citizen of the United States by the Constitution and laws thereof, and that said conspiracy and assault did not violate any privilege or immunity of a citizen of the United States, and that the indictment showed that no offense was committed against the criminal laws of the United States, but only an offense against the laws of the State of Alabama.

The court lays down first the proposition as follows:

Unquestionably the right of a citizen to organize miners, artisans, laborers, or persons in any pursuit, as well as the right of individuals in such callings to unite for their own improvement and advancement, or for any other lawful purpose, is a fundamental right of a citizen, protected in every free government worthy of the name. The only issue this case presents is, to what government, under our complex institutions, is committed the duty to protect that right?

The court goes on to call attention to the fact that the rights of men to organize and to act together for the protection of their liberties is one of those natural, inalienable rights that was in existence long prior to the existence of the Constitution, and that that Constitution recognized that right and asserted it, but left the protection of it, like that of many other domestic rights, to the State. The court says:

The Constitution of the United States, as we repeat, left the power and duty to protect life, liberty, property, the pursuit of happiness, freedom of speech, the press, and religious liberty, and the right to order persons and things within their borders, for the protection of the health, lives, limbs, morals, and peace of citizens, save as the original power of the States over them might be disturbed or destroyed by the specific grants of power to the General Government where the Constitution found them—in the exclusive

keeping and power of the State—and denied the General Government any responsibility for or power over them. Rights like these do not arise from the Constitution of the United States, and are in no wise dependent upon it.

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The right or privilege here involved is not granted in terms to any citizen of the United States by any provision of the Constitution. Its exercise is not necessary to the enjoyment of any right or privilege which the Constitution does specify and confer. It does not result from relations of citizens of the United States to the Government of the United States, as needful or proper to the discharge of any duty the citizen owes it. Its protection is not essential to the supremacy of the General Government over any matter committed to it by the Constitution, nor is its enforcement a proper means to any end which the Constitution ordained the Government of the United States to accomplish. The right has not been assailed or invaded under any State law or by any State authority, or on account of race, color, or previous condition of servitude, or in any other way than by the acts of lawless individuals. How, then, can such an offense fall within the criminal jurisdiction of the courts of the United States?

The demurrer to the indictment was sustained.

I call your attention to that because one of the arguments made for the amendment here asked for was that this statute was the proper place to assert such rights; that they were constitutional rights, the rights of citizens to organize for the protection of their contract, and such rights ought to be asserted by the United States in a statute.

Mr. LITTLEFIELD. Ought that not to be taken with the qualification that this is an attempt to modify a Federal statute, and that quoad Federal legislation, those rights ought to be asserted so far as that jurisdiction is concerned?

Mr. DAVENPORT. If it is made broad enough to cover both, it is illegal as a whole; but it is legitimate to suggest in the process of amending a Federal statute that such remedies as they think they are entitled to have should be taken into account when we make the amendment. That is a legitimate subject for discussion. What weight should be given to that is another thing. The rights of labor is a matter to be taken into account in determining what sort of an amendment is to be recommended.

Mr. EMERY. I have nothing further to say on this subject, Mr. Chairman, except to say that finally, in addition to the arguments heretofore made against the bill, we finally urge that these later amendments have made the entire subject-matter so vague, so uncertain, so indefinite, so impossible of intelligent discussion, much less of intelligent application to particular sets of facts, that the obscurity and vagueness which clouds the entire bill, quite apart from any discussion of the substantial things suggested or contained therein, is so great as to make the bill unworthy of consideration as an amendment to a clear-cut, thoroughly interpreted, and effective law. Its effect would simply be to endanger a piece of legislation that has been on the statute books almost twenty years and has been interpreted by the courts of the United States very carefully, and we say therefore the committee should very carefully consider the protection of existing legislation of an important character against its amendment by obscure legislation the effect of which would be, for that reason if for no other, to endanger the legality of the entire existing law. I want to take occasion personally to thank the committee very much indeed for its patience and indulgence through a very long, difficult, and tiring hearing.

Mr. LITTLEFIELD. I want the notes to show that Mr. Schuller is representing the Antitrust League, appeared at the session of the

committee last evening and requested an opportunity to be heard, and that the chairman handed him his copy of the proposed amendment last evening so that he could familiarize himself with it and be prepared to be heard, and that at that time an adjournment was had until 2 o'clock this afternoon at the room of the Committee on Expenditures in the Department of Agriculture, when Mr. Schalter was to be heard, and that the chairman of the committee has been in session in that room from 2 o'clock until 10 minutes of 5 and Mr. Schulteis has not appeared; and that under the circumstances, while the chairman would have been very glad to hear Mr. Schulteis's suggestions as to the pending legislation, the chairman does feel that the hearings ought to be closed, although Mr. Schulteis has not been heard.

(At 5 o'clock p. m. the subcommittee adjourned.)





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